Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

TIMKEN U.S. CORPORATION AND
TIMKEN NADELLAGER, GMBH,
Petitioners,

v.

UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, under general principles of administrative law, an administrative agency that is charged with an investigatory duty to collect all the facts that are required for a calculation that is as accurate as possible, may lawfully decline to use corrected information that was offered by the party that provided the original information, when the agency had adequate time to take the information into account and when the corrected information was supported by documentary evidence which exceeded the level of evidence ordinarily required by the agency?

Whether, under general principles of administrative law, an investigative agency's decision *not* to use corrected data may be upheld, if the corrected data was supported by documentary evidence, and the agency's doubts regarding the evidence, if any, could have been addressed by additional information requests, but were not?

Whether the affirmance of the agency's decision by the United States Court of Appeals for the Federal Circuit, which was based on a review of the evidence, is contrary to the principle (sanctioned by this Court) that once the proponent of a fact establishes a prima facie case, supported by credible evidence, the fact must either be rebutted or accepted as true?

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Timken U.S. Corporation and Timken Nadellager, GmbH are wholly-owned subsidiaries of The Timken Company.

The appeal to the United States Court of International Trade was brought by The Torrington Company and Torrington Nadellager, GmbH, at that time wholly-owned subsidiaries of Ingersoll-Rand. On February 18, 2003, The Torrington Company and Torrington Nadellager, GmbH, were acquired by The Timken Company. As a result, The Torrington Company became Timken U.S. Corporation and Torrington Nadellager, GmbH became Timken Nadellager, GmbH.

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

Timken U.S. Corporation and Timken Nadellager, GmbH (hereinafter referred to as the "Company"), Petitioners, pray that this Honorable Court issue a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Federal Circuit entered in this case on January 10, 2006.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Federal Circuit was entered on January 10, 2006, and is reported as *Timken U.S. Corp. v. United States*, 434 F.3d 1345 (Fed. Cir. 2006), *reh'g*

denied, No. 05-1158 (Fed. Cir. Apr. 12, 2006). Appendix A, *infra*, Pet. App. 1a-27a. The order denying the Petition for Rehearing was entered on April 12, 2006 and is unreported. Appendix B, *infra,* Pet. App. 28a-29a.

The United States Court of International Trade's decision and remand order was entered on March 5, 2004, and is reported as *Timken U.S. Corp. v. United States*, 318 F. Supp. 2d 1271 (Ct. Int'l Trade 2004). Appendix C, *infra*, Pet. App. 30a-52a. The United States Court of International Trade's final affirmance of Commerce's redetermination was entered on October 29, 2004, and is available as *Timken U.S. Corp. v. United States*, 2004 WL 2423732, Slip Op. 04-135 (Ct. Int'l Trade, Oct. 29, 2004), *aff'd* 434 F.3d 1345 (Fed. Cir. 2006). Appendix D, *infra*, Pet. App. 53a-68a.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2006. Timken's Petition for Rehearing was denied on April 12, 2006. This petition for a *writ of certiorari* is filed within ninety days of the date that the Petition for Rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The following statutory provisions are involved: Sections 516A(a), 516A(b), 731, 751(a)(1), 751(a)(3), 751(d)(1), 751(e), 771(1), 771(35)(A), 774(b), and 782(d) of the Tariff Act of 1930, as

amended, codified at 19 U.S.C. §§ 1516a(a), 1516a(b), 1673, 1675(a)(1), 1675(a)(3), 1675(d)(1), 1675(e), 1677(1), 1677(35)(A), 1677c(b), and 1677m(d). Appendix E, *infra*, Pet. App. 69a-81a.

The following regulations are involved: 19 C.F.R. §§ 351.106(c), 213(h)(1), 221(b)(2), 221(b)(4), 221(b)(5), 222(b)(2), 222(e)(1), 301(a), 301(c)(2), 303(g), 309(c)(2), and 310. Appendix F, *infra*, Pet. App. 82a-93a.

STATEMENT OF THE CASE

The United States Court of International Trade possessed jurisdiction under 28 U.S.C. § 1581(c). The United States Court of Appeals for the Federal Circuit possessed jurisdiction under 28 U.S.C. § 1295(a)(5) (creating jurisdiction to review decisions of the United States Court of International Trade).

A. Statutory and Regulatory Background

The United States Department of Commerce ("Commerce") is entrusted with the enforcement of the antidumping law. 19 U.S.C. § 1677(1). The antidumping law requires Commerce to impose a duty on a class or kind of foreign merchandise whenever such merchandise is being sold in the United States at less than its fair value and the United States International Trade Commission determines that an industry in the United States is being injured by reason of imports of that merchandise. 19 U.S.C. § 1673. The duty is equal to the amount by which the normal value exceeds the export price or constructed

export price for the merchandise, referred to as the dumping margin. 19 U.S.C. §§ 1673, 1677(35)(A).

The amount of the duty is subject to annual review by Commerce, if Commerce receives a request for such a review. 19 U.S.C. § 1675(a)(1). If Commerce finds *de minimis* dumping margins with respect to a particular exporter in three consecutive years, then Commerce may determine to revoke the antidumping order with respect to that exporter. 19 U.S.C. § 1675(d)(1); 19 C.F.R. § 351.222(b)(2).

Commerce reports that as of May 3, 2006, there were 318 antidumping duty and countervailing duty orders in place, covering a variety of products from forty different countries. Commerce also reports that between 1980 and 2003, it completed over 1,600 antidumping annual reviews.

B. Statement of Facts

The Company produced cylindrical roller bearings in Germany, primarily for sale in Germany. A small portion of its production, however, was exported to the United States. In two prior annual review periods, Commerce had found *de minimis* dumping margins (*i.e.*, below 0.5 percent) with regard to these exports. 19 C.F.R. § 351.106(c).

On the basis of these prior determinations, and in the expectation that Commerce would again find a *de minimis* margin, the Company asked Commerce to review its exports of cylindrical roller bearings imported into the United States between May 1, 1998 and April 30, 1999. The Company in-

cluded a request that Commerce revoke the antidumping order with respect to the Company's exports of cylindrical roller bearings from Germany. 19 C.F.R. § 351.222(e)(1).

Commerce, in due course, initiated such an annual review, and, upon initiation, forwarded a detailed questionnaire to the Company, asking it to supply information concerning its sales in Germany and in the United States (as it had done in prior annual reviews). 19 C.F.R. §§ 351.221(b)(2), 301(a), 301(c)(2).

The Company timely supplied the requested data. The data consisted, *inter alia*, of several electronic databases containing transaction-by-transaction accountings of the Company's sales in the United States and in Germany in the time periods sampled by Commerce. For each reported sales transaction, the electronic data included, *inter alia*, the quantity sold, the price, the identity of the customer, a specific identification of the product sold (in this case the bearing model number), and, of particular relevance in this case, an identification of the "channel of distribution" in which the reported sale took place. The identification of the channel of distribution distinguished, *inter alia*, "large OEM [original equipment manufacturer] sales," "small OEM sales," and "aftermarket sales." Responding to an additional information request, the Company also supplied an electronic database containing cost of production data for each of the models included in its home market sales response.

the root of the high dumping margin calculated by Commerce.

The Company, in written argument addressing the preliminary results, offered corrective data, which identified the specific sales transactions which had been misclassified, and identified the correct classification of these sales. 19 C.F.R. § 351.309(c)(2) (permitting submission of "case brief").

The corrections were supported by certifications, as required by agency regulations, and by transaction-specific documentation for each of the affected transactions. The documentation consisted of copies of invoices (in all instances) and customer purchase orders (in nearly all instances), accompanied with explanatory statements and translations as needed to permit an understanding of the documents.

In addition to the written argument, the Company participated in the hearing Commerce conducted, presenting argument in support of the reclassification. 19 U.S.C. §§ 1675(e), 1677c(b); 19 C.F.R. § 351.310.

Although its regulations expressly provide that Commerce may request information at any time, Commerce, in this case, did not ask for any additional information or further explanation regarding the corrections. 19 C.F.R. § 351.301(c)(2).

On August 11, 2000, more than four months after the preliminary results, Commerce published its final results. 19 U.S.C. § 1675(a)(3); 19 C.F.R. §

351.221(b)(5). Commerce declined to use the corrected data. As a result, the high dumping margin calculated in the preliminary results remained unchanged.

Commerce explained that according to its practice (referred to as the "*Columbian Flowers Test*"), it generally accepted only corrections of *clerical* errors at this stage of the proceeding, and then only if such corrections were adequately supported (among other restrictions). Commerce explained that in this case it had determined that the errors were not clerical, and, moreover, that the corrections were insufficiently supported.

Upon review, the United States Court of International Trade agreed with Commerce that the errors were not clerical in nature. Pet. App. 43a. The court, however, rejected Commerce's view that the original classification of the seventeen sales reflected a deliberate or intentional decision. Pet. App. 44a-45a. Moreover, the court found that a remand was needed: "A complete review of the confidential material of this case reveals a situation where rigid compliance with the *Columbian Flowers Test* would render a grossly erroneous dumping margin." Pet. App. 45a. "Ultimately, Commerce calculated an extremely high CV [constructed value] profit rate and a dumping margin of 61.60 percent based only upon a few misclassified sales." Pet. App. 45a. "Although the Court recognizes that the burden falls on a respondent to provide accurate information, it is unreasonable to believe that a respondent can do so in each and every review without committing occasional errors." Pet. App. 47a.

The court remanded to Commerce, as follows: "In the interest of implementing the overarching principle of the antidumping statute, that is, to determine dumping margins as accurately as possible, the Court remands this case to Commerce to further investigate the claims raised during the administrative proceeding. Any other finding would render a punitive result in contravention to [*Allied Tube & Conduit Corp. v. United States*, 127 F. Supp. 2d 207, 218 (Ct. Int'l Trade 2000)]." Pet. App. 49a (citations omitted).

In its remand determination, however, Commerce continued to disregard the modified data. Commerce explained that the corrections were insufficiently supported. The Court of International Trade, on that basis, affirmed. Pet. App. 66a-67a.

Upon appeal, the Court of Appeals for the Federal Circuit rejected Commerce's position that corrections offered in the context of Commerce's preliminary results should be limited to the correction of *clerical* errors. Pet. App. 13a-19a. The court also rejected Commerce's contention that the new data could be rejected merely because the data had not been independently verified by Commerce. Pet. App. 19a-20a.

The court of appeals, however, affirmed Commerce's determination that the corrections were *insufficiently supported.* The court's opinion includes a review of the documentary evidence that had been offered in support of the corrections, in which the court identifies what it regarded as shortcomings or weaknesses in that evidence:

- An explanatory notation on an invoice was "produced specifically for the purpose of proving the alleged miscategorization," and was itself not further substantiated. Pet. App. 21a.

- Notations on an invoice and an attached "code sheet" were "possibly . . . added after [the Company] decided to argue that it erred in categorizing the sale," and were not further substantiated with other evidence demonstrating that the bearings were *in fact* used as spare parts and not incorporated into the products produced by the customer. Pet. App. 21a.

- Notations on purchase orders which translated the German word "ersatzteile" to "spare parts" were not corroborated with "any evidence" that the bearings were, in fact, also *used* as spare parts by the customer. Pet. App. 21a-22a.

- The Company appeared to distinguish between large and small OEMs on the basis of the size of the product sold, which was counterintuitive and not supported by the descriptions of the channels of distribution provided in the Company's responses to Commerce's data requests. Pet. App. 22a-24a.

- The Company's assertion, that invoices containing the word "Muster" (German for "sample") or displaying an address containing the word "Prototypen" (German for "prototypes") disproved the transactions' original classification as OEM sales, "seem[ed] contradicted" by the Company's general description of the OEM channel of distribu-

tion, which noted that OEM sales were often supported or preceded with the provision of samples or prototypes, and by the fact that the customer was a large OEM producer. Pet. App. 24a-25a.

- While the sales which the Company asserted were mistakenly classified as OEM sales all involved small quantities, the claim that the average OEM channel sales averaged more than 14,000 units was not substantiated with any evidence. Pet. App. 25a-26a.

In the words of the court, there was "a failure of proof" and "none of the new evidence that [the Company] submitted adequately support[ed] its position that it initially misclassified seventeen sales." Pet. App. 26a. The court concluded: "Although this is a close case, we hold that Commerce's original determination was, on the balance of the old and new evidence, supported by substantial evidence and was not contrary to law." Pet. App. 26a.

The Company filed a petition for panel rehearing. The petition noted that the court's discussion of the distinction between large and small OEMs, Pet. App. 22a-24a, profoundly misstated the position of the Company, in that the Company had *never* asserted at any stage in the proceedings before Commerce, or the reviewing courts, that the distinction between small and large OEM sales was based on the size *of the product*.

The petition for panel rehearing also noted that the new evidence, submitted to support the re-

classification of the seventeen sales in issue, constituted the *only* evidence of record addressing the classification of these specific transactions, because previously submitted evidence was limited to general descriptions of the channels of distribution, and did not attempt to support the classification of *any* specific transactions.

The petition, however, was denied. Pet. App. 28a-29a.

REASONS FOR GRANTING THE WRIT

The Court's intervention in the instant matter is necessary because the decision of the court of appeals, affirming the agency's decision, sanctions a standard of proof that is at odds with Commerce's investigatory duties under the antidumping statute, is violative of the rules of evidence applicable to adjudicatory fact finding by administrative agencies, and results in the application of a punitive duty, in violation of the antidumping statute's remedial purpose.

Antidumping (or countervailing) duties are intended to be remedial, not punitive. *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103-04 (Fed. Cir. 1990). As such, Commerce is required to determine a dumping margin that is as accurate as possible. *Transcom, Inc. v. United States*, 294 F.3d 1371, 1376 (Fed. Cir. 2002); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995); *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

Therefore, Commerce is not free to decline to use corrective information, if such information is offered in time for the agency to account for it and is adequately supported by documentary evidence. Here, the corrective information was offered in such time and was supported. As reviewed in the statement of facts, the Company supplied transaction-specific documentary evidence, consisting of copies of invoices and purchase orders, accompanied by translations and explanatory notations.

The evidence supplied by the Company exceeded the level of evidence required by Commerce for the originally submitted information. Commerce does not normally require transaction-specific evidence to support a respondent's various factual representations regarding the numerous sales transactions contained in an electronic database of sales. Instead, Commerce requires that the respondent supply, in the *narrative* sections of the response, general descriptions of the various data elements contained in the electronic database and the methodology used to obtain these data. Thus, representations regarding the proper channel of distribution are supported by descriptions of the channels. The Company's original data, in fact, were supported with such general (non-transaction-specific) evidence.

Moreover, it is Commerce which must investigate and collect the information that is required for an accurate calculation. Commerce may not rely on the *absence* of information to support any decision, if such information could have been asked for, but was not. *Allegheny Ludlum Corp. v. United States*, 287

F.3d 1365, 1373 (Fed. Cir. 2002); *Creswell Trading Co. v. United States*, 15 F.3d 1054, 1061-62 (Fed. Cir. 1994); *Freeport Minerals Co. v. United States*, 776 F.2d 1029, 1032-33 (Fed. Cir. 1985).

In the instant case, the court of appeals recognized Commerce's investigatory duties *in one respect only*: it firmly rejected Commerce's contention that it was authorized to reject the new evidence because it had not been verified by Commerce. Pet. App. 19a. The court explained:

> We are struck by the fallacy of such a position; Commerce declines to verify the new information and then rejects it because it is unverified. If Commerce had reason to doubt Timken's corrective information, then it could have, and perhaps should have, performed a second verification. Indeed, the government, we note, does not cite any statute or regulation barring such a second verification.

Pet. App. 19a-20a.

The same rationale, however, applies equally to Commerce's rejection of the new data on grounds that the evidentiary support was insufficient. Timken submitted the corrective information shortly after Commerce's preliminary determination. Commerce not only could have conducted additional verification, but it also could have asked for additional supporting material, if such additional support was deemed necessary.

In fact, while Commerce rarely conducts a second verification, it *routinely* asks for additional information to clarify points in respondents' initial responses to Commerce's data requests, or where adjustments and claims contained in the initial response are inadequately supported. Indeed, the statute *requires* that Commerce advise the submitter of deficiencies in the data as discerned by Commerce, and the statute requires the Commerce provide the submitter with "an opportunity to remedy or explain the deficiency ...." 19 U.S.C. § 1677m(d). Moreover, on a number of occasions in other administrative reviews, the agency has requested additional data *after* publication of the preliminary results. *See, e.g., Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Malleable Iron Pipe Fittings From the People's Republic of China*, 68 Fed. Reg. 61,395, 61,396 (Dep't of Commerce Oct. 28, 2003); *Notice of Final Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat From the People's Republic of China*, 62 Fed. Reg. 41,347 (Dep't of Commerce Aug. 1, 1997).

In the instant matter, however, Commerce, following the Company's submission of the corrective data, never asked for additional data or explanation, nor did it even suggest that the evidence offered in support of the corrective data was deficient or lacking in any manner. Yet, in its final results, Commerce, for the first time, asserted that the corrections lacked evidentiary support, and the court of appeals affirmed on that basis.

Commerce's decision, and the appellate court's affirmance, is also at odds with rules of evidence

generally applicable to adjudicatory fact finding by an administrative agency.

Once the proponent of a fact establishes a prima facie case, supported by credible evidence, the fact thus established "must either be rebutted or accepted as true." *OWCP Dir. v. Greenwich Collieries*, 512 U.S. 267, 280 (1994). The opponent's burden is not met by mere conjecture.

For example, in *Anderson v. Dep't of Transp.*, 827 F.2d 1564 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1026 (1988), former air traffic controllers challenged several decisions by the Merit Systems Protection Board sustaining the removal of the controllers on grounds of participating in a strike and unauthorized absence. *Id.* at 1564-69. The FAA produced documentary evidence supporting its conclusion that the controllers were absent without leave and participated in a strike. *Id.* at 1565-66. The controllers, in turn, attempted to discredit this evidence, noting various errors, inconsistencies, and alterations. *Id.* at 1566-67. The court held that the controllers' allegations could not overcome the prima facie case established by the documentary evidence. *Id.* at 1570; *see also EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 876-78 (7th Cir. 1994) (finding, in an employment discrimination case, that statistical evidence produced by EEOC established a prima facie case which was not overcome by allegations that statistics were flawed because they did not account for self-selection by the applicants and did not account for company's preference for skilled workers), *cert. denied*, 513 U.S. 1198 (1995).

The above principles apply equally in the context of antidumping investigations. In 1979, Congress "defin[ed] the scope and standard of review in suits challenging antidumping and countervailing duty determinations." S. REP. NO. 96-249, at 251 (1979) (noting also that prior law was "unclear and conflicting"); *see* 19 U.S.C. §§ 1516a(a)-(b) (providing for judicial review of Commerce determinations and establishing the standard of review). Congress intended that "traditional administrative law principles are to be applied in reviewing antidumping and countervailing duty decisions ...." S. REP. NO. 96-249 at 252.

Antidumping proceedings, and annual reviews in particular, moreover, have important adjudicatory aspects. An annual review does not merely result in the collection of information, but it also results in a determination of duties due on particular merchandise entered during the review period, as well as the determination of a deposit rate to be applied to imports entered after the publication of the final results of the review. 19 U.S.C. § 1675(a)(1); *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1381 (Fed. Cir. 2001) (holding that Commerce procedures are relatively formal procedures that adjudicate parties' rights, requiring a determination of the duty to be assessed and the estimated duty to be deposited (citing *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001))).

In fact, the Court of Appeals for the Federal Circuit has applied these principles in its review of Commerce's decision-making. In *Creswell Trading*, 15 F.3d at 1061, the government of India submitted

market prices to support its assertion that it did not supply pig iron to the appellants at terms and conditions more favorable than available in world markets. The court held that in light of this evidence, "the burden of production shifted back to Commerce to come forward with proof that this evidence was neither accurate nor sufficient ...." *Id.* The court further held that Commerce's assertions that the evidence was "inherently" inaccurate (because it was out of date) were insufficient to overcome the evidence, and the court concluded that "Commerce's misunderstanding of its burden of coming forward with evidence that the Indian government's international benchmark prices were in fact inaccurate was a procedural error that went to the heart of its administrative determination...." *Id.* at 1062; *see also U.S. Steel Group v. United States*, 96 F.3d 1352, 1359 n.9 (Fed. Cir. 1996) (observing that the *Creswell* rule applies to situations where an agency requires data within the knowledge and control of other parties, such as the exporter, that cannot be obtained independently, and declining to apply the rule to a decision that imports from several countries did not have a discernible adverse impact on the domestic industry).

In this case, there can be no doubt that the Company met its burden of establishing a prima facie case in support of reclassification of the seventeen sales at issue. The reclassification was supported by documentary evidence, created in the normal course of business, and amplified as needed by explanatory notations and declarations. Moreover, the evidence submitted in support of the new

data greatly exceeded the level of evidence normally required by Commerce for originally submitted facts.

The review offered by the court of appeals did not rebut this evidence. The court's review was limited to: (1) conjecture as to whether the Company's explanatory notations were tainted because they were made for the purpose of supporting the reclassification, Pet. App. 20a-21a; (2) assertions that translations or statements by Company personnel were not *further* supported by additional evidence, Pet. App. 21a; (3) conjecture that certain bearings sold as spare parts might not *in fact* have been used as spare parts, Pet. App. 21a; and (4) attempts to find discrepancies or contradictions between the facts as supported by the invoice and purchase orders and the generalized descriptions found in the original narrative responses, Pet. App. 22a-25a.

Such speculative concerns are insufficient to overcome the prima facie case established by the Company's documentary evidence. Moreover, as reviewed, the concerns could have been addressed by the agency. *See Poulin v. Bowen*, 817 F.2d 865, 873 (D.C. Cir. 1987) (holding that it was incumbent on the administrative law judge to obtain additional evidence where the existing record was unclear or confusing because it was not complete or in a foreign language).

The above issues merit this Court's attention. An administrative agency charged with investigating facts and reaching results as accurately as possible fails in its administrative function if it unreasonably refuses to consider information. Unreasonably re-

jecting information defeats the purpose of the underlying statute and therefore distorts the antidumping statute's remedial intent.

CONCLUSION

For all of the reasons stated above, Petitioners pray that this Honorable Court grant this petition for a *writ of certiorari.*

Respectfully submitted,

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Dated: July 11, 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 05-1158

TIMKEN U.S. CORPORATION AND TIMKEN NADELLAGER, GMBH, PLAINTIFFS-APPELLANTS,

v.

UNITED STATES, DEFENDANT-APPELLEE.

Decided: January 10, 2006

Before: MICHEL, *Chief Judge*, CLEVENGER and SCHALL, *Circuit Judges*.

MICHEL, *Chief Judge*.

Timken U.S. Corporation and Timken Nadellager, GmbH (collectively "Timken") appeal the United States Court of International Trade's decision upholding the United States Department of Commerce's antidumping duty determination and Commerce's refusal to correct certain alleged errors associated with Timken's home market sales that were relied upon by Commerce in computing the

dumping margin for Timken's cylindrical roller bearings exported from Germany to the United States from May 1, 1998 to April 30, 1999. *Timken v. United States*, No. 00-09-00454 (Ct. Int'l Trade Oct. 29, 2004). Because the Court of International Trade did not err in remanding the case to Commerce for investigation of Timken's evidence supporting correction and because Commerce's antidumping duty determination and its refusal to correct the alleged errors on remand were supported by substantial evidence and were in accordance with law, we affirm.

I. BACKGROUND

Like many appeals from the Court of International Trade, this appeal has a somewhat complex history. In 1999, pursuant to Section 751 of the Tariff Act of 1930, Commerce conducted its tenth administrative review of the Antidumping Duty Orders on cylindrical roller bearings ("bearings") from, *inter alia*, Germany for the period of May 1, 1998 to April 30, 1999. Timken imported bearings made in Germany into the United States during that period of time and thus its importations were subject to Commerce's review.

Commerce provided Timken with a questionnaire and requested Timken to identify the channels of distribution for its home market sales. Timken identified five channels: (1) sales of bearings produced by Timken and sold by Timken from its factory to large original equipment manufacturers ("OEMs"); (2) sales of bearings produced by Timken and sold by Timken from its factory to small OEMs;

(3) sales of bearings produced by Timken and sold by Timken from its factory to distributors; (4) resales of bearings made by Timken's affiliated marketing entity to OEMs; and (5) resales of bearings made by Timken's affiliated marketing entity to distributors.[1] Timken also described the selling and marketing processes for each of the five channels of distribution. After receiving Timken's response, Commerce verified Timken's categorization of its sales.

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[1] Commerce and Timken interpret the definition of "large OEMs" under channel 1 and "small OEMs" under channel 2 differently based upon whether the words "large" and "small" refer to the size of the OEM or the size of the product produced by the OEM. Commerce takes the former position, while Timken takes the latter. Indeed, in Commerce's own words:

> It is important to recognize that the term "large original equipment manufacturer," which connotes the level of trade in which such sales were grouped in the final results of review, does not refer to producers of "large original equipment." Rather it refers to large producers of original equipment. That is, the term "large" modifies the type of manufacturer, not the type of product.

Final Results of Redetermination Pursuant to Court Remand, Timken U.S. Corporation and Timken Nadellager, GmbH v. United States, No. 00-09-00454, slip op. at 7 (June 7, 2004) ("*Remand Determination*"). Timken does not so clearly explain its view. However, we are able to infer its position based upon the arguments it made before Commerce, the Court of International Trade, and this court on appeal.

Based upon the verification information, Commerce examined Timken's selling activities, the point in the channel of distribution at which the selling activities occurred, and the types of customers that purchased the subject bearings and eventually determined that three of the channels of distribution identified by Timken were for home market sales by Timken itself and the remaining two were for "resales" by Timken's affiliated marketing entity. As a result, Commerce re-designated channel 1 as home market 1 ("HM1"), grouped channels 4 and 5 together and re-designated them as home market 2 ("HM2"), and grouped channels 2 and 3 and re-designated them as home market 3 ("HM3"). In grouping channel 2 with 3 and channel 4 with 5, Commerce essentially determined that the points in which selling activities occurred in these channels were indistinguishable. Commerce then computed a dumping margin of 61.60 percent and published its preliminary results. *See* Preliminary Results of Administrative Review, Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom, 65 Fed. Reg. 18033 (Apr. 6, 2000).

After reviewing Commerce's results, Timken alleged that it had made certain errors, which it characterized as "clerical," in reporting its sales. Specifically, Timken claimed that it "inadvertently and inaccurately" reported seventeen transactions in channel 1 instead of channel 2 or 3. This mistake, Timken claimed, caused those transactions to be

categorized into HM1 instead of HM3, which in turn resulted in an inaccurate dumping margin. Timken contends that the errors occurred because it relied on the customer's name alone in categorizing the sales, rather than on whether the customer used the bearings in large-sized products or small-sized products. Timken divided these errors into three groups: (1) sales of bearings shipped to several large OEMs for use as replacement parts ("Replacement Parts Sales"); (2) sales of bearings shipped to a division of a large OEM for use in small electric tools ("Small Electric Tools Sales"); and (3) sales of bearings shipped to a prototype center of a large OEM for use in prototypes ("Prototype Sales").

Timken requested Commerce to correct these errors before issuing the final results. In support of its request, Timken submitted a "case brief," which included exhibits consisting of invoices and corresponding purchaser orders for the seventeen allegedly miscategorized sales. Commerce applied the test highlighted in Certain Fresh Cut Flowers from Colombia; Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 42833 (Aug. 19, 1996), in deciding whether to substitute Timken's new information and recalculate the applicable dumping margin. The first requirement of the so-called "Colombian Flowers Test" is that the error be of a "clerical" nature, not a "methodological error, a substantive error, or an error in judgment." Commerce found that Timken's errors were not "clerical" but instead were due to "error[s] in judgment." The second requirement of the "Colombia Flowers Test" is that Commerce must be satisfied that the new

evidence provided in support of the "clerical" error is reliable. Commerce found that the new information that Timken submitted in its case brief conflicted with information already of record and that the corrections were not offered at the earliest opportunity, thus allegedly preventing Commerce from ascertaining their reliability through the verification process. For these reasons, Commerce declined to correct the asserted errors and issued its final results without any changes. *See* Final Results of Administrative Review, Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, German, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom, 65 Fed. Reg. 49,219 (Aug. 11, 2000).

Timken appealed to the Court of International Trade. *See Timken U.S. Corp. v. United States*, 318 F. Supp. 2d 1271 (Ct. Int'l Trade 2004) ("*Timken I*"). The Court of International Trade rejected Commerce's rigid application of the "Colombia Flowers Test," even though it agreed with Commerce that Timken's error was not "clerical," because the Court of International Trade was concerned that Commerce's application of the test would render a grossly erroneous dumping margin in this case. *Id.* at 1277. The Court of International Trade also noted that it was unclear what evidence of record Commerce thought contradicted Timken's new evidence and that any corrective information would necessarily be in conflict with information originally submitted to Commerce. *Id.* at 1279. Accordingly, the Court of International Trade remanded the case to Commerce for further investigation.

On remand, Commerce noted its disagreement with the Court of International Trade's order at the outset. *Remand Determination*, slip op. at 4. Because Commerce posited that the errors in dispute were not "clerical," as determined by the Court of International Trade, these errors did not require correction and there was no need for any further investigation. Despite this position, Commerce of course followed the Court of International Trade's order and reviewed Timken's new evidence, ultimately determining that corrections were not warranted because "the information [Timken] submitted does not substantiate the existence of the alleged error, and, thus, reclassifying [Timken's] sales in a different level of trade would not result in a more accurate dumping margin." *Id.*, slip op. at 8. In reaching that conclusion, Commerce specifically evaluated the new information that Timken submitted for the three groups of allegedly miscategorized sales.

Starting with the first group, Commerce found that Timken's argument that the Replacement Part Sales should have been categorized under channel 3 conflicted with the information of record. Commerce noted that Timken described the bearings it sold under channel 3 in its verified questionnaire as those listed in its "standard catalog," not replacement parts. *Id.*, slip op. at 16. It consequently found that Timken failed to provide a sufficient explanation of why replacement parts should be classified under channel 3. Commerce also observed that the customers of the Replacement Part Sales were large OEMs, not distributors—the customers Timken originally

identified for channel 3 sales. *Id.*, slip op. at 16-17. Lastly, Commerce noted that Timken did not provide evidence showing the bearings were, in fact, used as replacement parts. "The merchandise," Commerce reasoned, "very well may have been used for the normal production activities of the large OEMs." *Id.*, slip op. at 17.

Turning to the second group, Commerce found Timken did not provide factual information to substantiate the claim that the customer of the Small Electric Tools Sales, a division of a large OEM, should independently be considered a small OEM under channel 2 instead of a large OEM under channel 1. *Id.*, slip op. at 14-15.

As to the third group, Commerce found that Timken's argument that the Prototype Sales should have been categorized under either channel 2 or 3 conflicted with the information of record. Significantly, it noted that when Timken described the selling function of channel 1 in its verified questionnaire, it specifically mentioned prototype sales, but did not do so for either channel 2 or 3. *Id.*, slip op. at 12-13. Next, Commerce noted that the customer of the Prototype Sales was a large OEM. "That fact alone," Commerce reasoned, "supports the original channel 1 classification." *Id.*, slip op. at 13. It further noted that only two of the invoices submitted by Timken for the Prototype Sales contained the word "Muster," the German equivalent of "sample," thus suggesting that the remaining Prototype Sales did not actually involve prototypes and were instead regular sales to a large OEM. *Id.* Finally, Com-

merce noted that Timken did not provide any evidence showing that the alleged prototypes were not used in producing original equipment. *Id.*, slip op. at 14.

Timken again appealed to the Court of International Trade, which upheld Commerce's remand determination not to make the requested corrections on the grounds that Timken's corrective information was not sufficiently supported whereas Commerce had verified Timken's original information. *Timken U.S. Corp. v. United States*, No. 00-09-00454 (Ct. Int'l Trade Oct. 29, 2004) ("*Timken II*"). The Court of International Trade observed that Commerce met its burden of reviewing the disputed classifications and the corrective information submitted by Timken. It thus concluded that Commerce provided a reasonable explanation for its determination that the dumping margin applicable to Timken's bearing imports was as accurate as possible and that there was no need to make any corrections. *Id.*, slip op. at 24.

Timken timely appeals the Court of International Trade's decision upholding Commerce's remand determination. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(5).

II. DISCUSSION

We review a decision of the Court of International Trade in an antidumping duty case *de novo*, applying the same standard of review to Commerce's determination as the Court of International Trade applies. *See Co-Steel Raritan, Inc. v. Int'l Trade*

Comm'n, 357 F.3d 1294, 1309 (Fed. Cir. 2004). Under that standard, we are obligated to affirm the Court of International Trade's decision unless Commerce's determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938). Notably, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (Fed. Cir. 2001).

Timken argues that Commerce's decision not to reclassify its allegedly miscategorized sales is not supported by substantial evidence. Timken asserts that the new information it submitted in its case brief at the preliminary results stage adequately supports the reclassification of its seventeen allegedly miscategorized sales from channel 1 to either channel 2 or 3. More specifically, for its Replacement Part Sales, that the customer was a large OEM, Timken contends, does not automatically mean that all sales were for bearings that would be incorporated into other goods; a large OEM may also purchase bearings to serve as replacement parts. In such case, Timken points out that the nature of sales and the associated selling activities are by definition different. It thus argues that the market in which its bearings were sold governs the classification, not the

identity of the customer, contrary to Commerce's determination.

For its Small Electric Tools Sales, Timken claims that the proper classification is ascertainable by resort to its descriptions of channel 1 and channel 2. Timken points out that it described channel 1 as involving "sales to automotive and other large OEMs" and channel 2 as involving "sales to smaller OEMs such as machinery and other equipment producers." Based upon these descriptions and the fact that the customer sells small electric tools, Timken asserts that the Small Electric Tools Sales necessarily fall under channel 2; that the customer is a division of a large OEM is irrelevant because the only point of distinction between channel 1 and channel 2 is the size of the goods sold.

For its Prototype Sales, Timken argues as it did for the Replacement Part Sales that customer identity does not control classification; rather, the market in which the product was sold dictates whether a particular sale should be categorized in channel 1, 2, or 3. Hence, that the customer of the Prototype Sales was a large OEM is, Timken claims, of no import in deciding whether the Prototype Sales were erroneously categorized in channel 1. Further, it asserts the fact that some invoices contained the word "Muster," while others did not, is not decisive since all Prototype Sales were shipped to the customer's prototype center, as shown on all the invoices.

Finally, Timken contends that the quantity of bearings involved in the allegedly miscategorized sales confirms that they were erroneously included in channel 1. Timken points out that each sale consisted of several hundreds of bearings; sales placed in channel 1, by contrast, involve several thousands of bearings. As such, Timken claims quantity alone demonstrates that its bearing sales were erroneously categorized in channel 1.

The government responds by arguing that Commerce's decision not to reclassify Timken's allegedly miscategorized sales is supported by substantial evidence. Beginning with the Replacement Parts Sales, the government asserts that Timken neither mentioned replacement parts in its descriptions of its channels of distribution nor offered an explanation for why such sales are correctly classified in channel 3 as opposed to channel 1. Turning to Small Electric Tools Sales, the government points out that Commerce correctly determined that Timken provided no evidence to substantiate its claim that the division of a large OEM, which manufactures small electric tools, should be considered a small OEM. Moreover, the government contends that Commerce correctly noted that while sales to a single customer may be classified in different channels of distribution, Timken failed to demonstrate facts sufficient to show that such bifurcation is necessary for the Small Electric Tools Sales. Finally, the government argues that if Commerce were to reclassify all of the Prototype Sales on the basis of only two invoices, it essentially would place unverified information over conflicting, verified information.

Even assuming Timken is correct that the sales were truly for prototypes, the government claims that such sales were properly included in channel 1 because Timken mentioned prototype sales only in its description of channel 1, not in its descriptions of channel 2 and 3.

As an alternative ground of affirmance, the government asserts that the Court of International Trade erred in *Timken I* by remanding the case to Commerce for investigation of Timken's new information. Because the Court of International Trade had agreed with Commerce that Timken's alleged errors were not "clerical," the government contends that the Court of International Trade should have simply affirmed Commerce's original refusal pursuant to the "Colombia Flowers Test." Accordingly, the government argues that Commerce's original antidumping duty determination and first refusal to correct should stand.

Timken replies to the government's alternative argument by disputing both Commerce's and the Court of International Trade's characterization of its errors as "errors in judgment." Timken claims that its errors are "clerical" and thus subject to correction under the "Colombia Flowers Test."

A.

Before addressing Timken's argument concerning its new evidence, we focus on the government's challenge to the Court of International Trade's remand order in *Timken I* since this issue potentially is dis-

positive of the appeal without requiring minute examination of the old and new information on various sales. On the merits, we disagree with the government. Essentially, it contends that the Court of International Trade erred in remanding the case for further investigation solely because it had concurred with Commerce's determination that Timken's errors were not "clerical" in nature. In making this argument, the government seems to advocate a bright-line rule regarding what kinds of errors may be corrected in the context of antidumping duty determinations. Specifically, it argues that once Commerce calculates a dumping margin, an error in the underlying data supplied by an importer to Commerce may be corrected only where it is "clerical" in nature. Surprisingly, counsel for Timken appeared to agree with the government's contention at oral argument. The government does not, however, identify any statute or regulation on point. Instead, it relies solely on our decision in *Alloy Piping Products, Inc. v. United States*, 334 F.3d 1284 (Fed. Cir. 2003), and its own determination in Certain Fresh Cut Flowers from Colombia, 61 Fed. Reg. at 42834. Such reliance is, however, misplaced.

In *Alloy Products*, after receiving the final results of Commerce's antidumping duty determination, the importer sought correction of what it described as a "clerical" error made when it provided its original sales information to Commerce. The importer argued that Commerce was absolutely and

expressly required to make the correction pursuant to 19 U.S.C. § 1673d(e) and 19 C.F.R. § 351.224.[2] Commerce declined, and both the Court of International Trade and this court affirmed. We recognized that Commerce was not required to correct the "clerical" errors made by the importer because the statute and regulation cited by the importer apply only to "clerical" errors committed *by Commerce itself*. 334 F.3d at 191. Contrary to the government's implication, however, we did not broadly bar Commerce from correcting "clerical" errors or, for that matter, methodological errors, errors in judgment, or substantive errors made by an importer. Instead, our decision in *Alloy Products* turned on the fact that the importer sought correction of errors at the final result stage, not at the preliminary result stage as in this case. For this reason, the facts in *Alloy Products* are readily distinguishable from those implicated here.

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[2] Section 1673d(e) states in pertinent part: "The administering authority shall establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued under this section." Section 351.224(e) provides in relevant part: "The Secretary will analyze any comments received and, if appropriate, correct any significant ministerial error by amending the preliminary determination, or correct any ministerial error by amending the final determination or the final results of review (whichever is applicable)."

Separately, a determination by Commerce, like *Certain Fresh Cut Flowers from Colombia*, is not binding on this court. We also disagree with the restrictiveness of the "Colombia Flowers Test." That test, which Commerce states is based on our decision in *NTN Bearing Corp. v. United States*, 74 F.3d 1204 (Fed. Cir. 1995), imposes six conditions which must be met before Commerce will correct an error made by an importer. The first condition is that the "error in question must be demonstrated to be a clerical error, not a methodological error, an error in judgment, or a substantive error." *Certain Fresh Cut Flowers from Colombia*, 61 Fed. Reg. at 42834. It is perplexing how Commerce could have derived this first condition from *NTN Bearing* when our holding in that case, as in *Alloy Products*, was premised exclusively on timeliness. Indeed, upon careful review, we do not even find any dicta suggesting a distinction between "clerical" and other types of errors, and Commerce cited none.

More specifically, after receiving the International Trade Administration's ("ITA") preliminary antidumping duty determination, NTN realized that it made two "clerical" errors caused by typographical mistakes. These clerical errors, NTN asserted, caused a substantial increase in its dumping margins. NTN offered corrective information to the ITA and sought to have corrections made before the ITA issued its final determination. The ITA refused because NTN made its request after the deadline for submitting new information had expired and because its new evidence did not adequately demonstrate that errors had occurred. Notably, the ITA did

not challenge NTN's characterization of its errors as "clerical." The Court of International Trade affirmed that refusal. We reversed, holding that the ITA abused its discretion in refusing to consider NTN's corrective information because of untimeliness. *NTN Bearing*, 74 F.3d at 1208. At no point in our analysis did we distinguish "clerical" errors from other errors such as methodological errors, substantive errors, or errors in judgment. We simply reasoned:

> NTN responded in a timely manner to the preliminary determination, pointing out ITA's clerical errors, as well as its own. ITA corrected its own but not NTN's errors. Correction of NTN's errors would neither have required beginning anew nor have delayed making the final determination. A straightforward mathematical adjustment was all that was required. Failure to make it resulted in the imposition of many millions of dollars in duties not justified under the statute.

Id. We also noted that while a tension between finality and correct result may arise in some instances, such was not the case in *NTN Bearing* because NTN requested corrections to be made at the preliminary results stage. *Id.* "[P]reliminary determinations," we observed, "are 'preliminary' precisely because they are subject to change." *Id.*

To the extent that Commerce cites *NTN Bearing* for the source of its distinction between "clerical" and other errors, we surmise that Commerce erroneously extrapolated one where none was stated or intended. We emphasize that our ruling in *NTN Bearing* was based solely on timeliness, not on the type of error. Additionally, we hold that Commerce is free to correct any type of importer error—clerical, methodology, substantive, or one in judgment—in the context of making an antidumping duty determination, provided that the importer seeks correction before Commerce issues its final results and adequately proves the need for the requested corrections. In light of this holding, we need not address Timken's argument that its errors were "clerical" rather than "errors in judgment" as found by Commerce and affirmed by the Court of International Trade.

Finally, the convenience of the bright-line rule that Commerce advocates is troubling. We suspect that it is not uncommon for an importer to make errors in reporting its sales information to Commerce pursuant to an administrative review. We also suspect that most such errors are methodological, substantive or, as in this case, errors of judgment, rather than "clerical" errors. Oddly, it nevertheless appears that Commerce has not issued any regulation addressing whether an importer can correct errors in the information it has submitted, let alone restricted the types of importer errors that are eligible for such correction. By urging this court to embrace Commerce's determination in *Certain Fresh Cut Flowers from Colombia* limiting correction to just "clerical" errors, the government seemingly aims

to save itself from having to evaluate corrective information in most cases, regardless whether correction is sought at the preliminary results stage or the final results stage. This court, however, has never discouraged the correction of errors at the preliminary result stage; we have only balanced the desire for accuracy in antidumping duty determinations with the need for finality at the final results stage. We thus have no choice but to conclude that Commerce's position here amounts to *ipse dixit*, which is a very weak basis for any rule. Accordingly, because Timken sought correction of its errors after Commerce issued the preliminary results, but before it issued the final results, we conclude that the Court of International Trade in *Timken I* did not err in remanding the case to Commerce for an analysis of Timken's new evidence.

B.

Turning to the heart of Timken's appeal, we disagree with Timken that the new evidence it submitted in its case brief, which consisted of invoices and, in most instances, corresponding purchase orders, is strong enough to require reclassification. At the outset, we note that the government contends in general that Commerce would be forced to prefer unverified information over conflicting, verified information if it were to make Timken's requested corrections. On appeal, the government particularly raises this argument with respect to Timken's Prototype Sales. We are struck by the fallacy of such a position; Commerce declines to verify the new information and then rejects it because it is unverified. If

Commerce had reason to doubt Timken's corrective information, then it could have, and perhaps should have, performed a second verification. Indeed, the government, we note, does not cite any statute or regulation barring such a second verification.

We now focus on Timken's allegedly miscategorized sales, beginning with the Replacement Part Sales for which there were eight total sales and three different customers, *i.e.*, three sales to the first customer, one to the second customer, and four to the third customer.[3] For sake of clarity, we consider the Replacement Part Sales for each of the three customers separately. For the first customer, one of the purchase orders contained a handwritten notation in German, which Timken contends translates as: "The parts (from the purchase order) are exclusively destined for repair purposes . . . The total annual demand for this purpose are 26 units." Timken explained that the notation applied to the other two purchase orders as well and was added by Mrs. Kleiner, an employee of Timken. According to Timken, Mrs. Kleiner contacted the customer in preparation for the case brief to confirm that the purchased bearings were not used in producing original equipment. Timken does not, however, present any

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[3] We note that the parties agreed to keep the identities of Timken's customers, among other things, confidential under the terms of a protective order. We refer only to the customers generally, because of the protective order and because their identities are not critical to the disposition of this appeal anyway.

evidence to substantiate her communication with the customer. Commerce was thus in the position of having to accept her notation, knowing full well that it was produced specifically for the purpose of proving the alleged miscategorization. Viewed in this light, we hesitate to fault Commerce for rejecting this evidence over evidence for these particular sales which it previously verified in conjunction with Timken's original submission.

For the second customer, the invoice contained a handwritten German word, which was not easily readable, followed by an equal sign and the words "Replacement Parts." That invoice, along with the corresponding purchase order, also contained a "649" code followed by the words "shipping point." A code sheet provided with the two documents listed "central location for replacement parts" for that code. It is, nevertheless, entirely unclear who supplied the handwritten information or when it was added to the invoice. As with the aforementioned Replacement Part Sales, the notation quite possibly was added after Timken decided to argue that it erred in categorizing the sale. Additionally, Timken did not present any evidence about the sale showing that the bearings were, in fact, used as spare parts and were not incorporated into original equipment produced by the customer. Consequently, we conclude that Commerce reasonably rejected this evidence over previously submitted evidence for this customer.

For the third customer, the purchase orders all contained the typed word "ersatzteile," followed

by an equal sign and the handwritten words "spare parts." While we do not doubt that German word "ersatzteile" correctly translates as "spare parts" or the equivalent thereof, Timken again did not provide any evidence to substantiate its claim that the bearings actually were used by the customer as spare parts. Commerce particularly noted the absence of such evidence in its determination: "The merchandise very well may have been used for the normal production activities of the large OEMs." *Remand Determination*, slip op. at 17.

As a final consideration applicable to the eight Replacement Part Sales in general, Timken did not offer a persuasive explanation of why, if the sales were really for spare parts, they should be categorized under channel 3 as opposed to channel 1. Indeed, in defining its channels of distribution in response to Commerce's original questionnaire, Timken did not mention replacement part sales in either channel 1 or channel 3. It consequently has no real basis for reclassifying the Replacement Part Sales in channel 3 as opposed to channel 1 or, for that matter, channel 2. Small OEMs under channel 2 are, after all, just as likely to purchase replacement parts as large OEMs under channel 1 or distributors under channel 3. Therefore, since any customer may require and purchase replacement parts, we conclude that customer identity is not a conclusive way for categorizing Timken's sales, but serves as a sound starting point. Here, the parties do not dispute that the three customers who purchased the Replacement Part Sales were all "large OEMs" classified under channel 1. As a result, we conclude that the evi-

dence supporting Commerce's original determination is substantial and that it was justified in refusing to reclassify the Replacement Part Sales from channel 1 to channel 3.

As to the Small Electric Tools Sales, there were four distinct sales, all to a single customer. One of the four invoices contained a handwritten notation showing an asterisk beside the customer name followed by the comment "product division electric tools." Because Timken's argument as to these sales substantially depends on whether the words "large" and "small" modify the size of the producer or the size of the products sold, we are compelled to reach that distinction in this context. If we agree with Timken that the words "large" and "small" modify the size of the goods produced, then Timken is necessarily correct that its Small Electric Tools Sales were miscategorized under channel 1 when they should have been categorized under channel 2. We do not, however, accept Timken's position. Although Timken is in a better position than Commerce to understand and define its various channels of distribution and customers, we nevertheless observe that Timken's argument is not supported by its own descriptions of its channels of distribution. If anything, Timken's descriptions favor Commerce's position that the words "large" and "small" modify the size of the producers. Throughout its descriptions for channel 1 and channel 2, Timken consistently placed the adjectives "large" and "small," respectively, before the noun "OEMs." Moreover, Timken did not clearly describe the goods produced by the OEMs under channel 1 or 2, let

alone define those goods as being "large" or "small." Commerce's analysts, like the average reader, would thus grammatically interpret the adjectives "large" and "small" to modify the noun "OEMs." It is entirely counterintuitive, based solely upon the syntax, to read the adjectives as modifying the products manufactured by the OEMs. We, consequently, must reject Timken's contention that a "large" or "small" OEM means an OEM that produces "large" or "small" products. As such, Timken's argument falls apart. Hence, we conclude that Commerce's refusal to reclassify the Small Electric Tools Sales from channel 1 to channel 2 is supported by substantial evidence.

With regard to the Prototype Sales, Timken made five separate sales to a single customer. Two of the invoices associated with those sales contain the German word "Muster." The other three invoices, although missing the word "Muster," were sent to the same location as the other two sales, presumably the customer's prototype testing facility since the shipping address for each sale contained the word "Prototypen." Timken's argument that these sales should be classified under channel 2 or 3 based upon the "Muster" notation and/or shipping address, however, seems contradicted by Timken's own description of its channels of distribution. As Commerce noted, when discussing sales under channel 1, Timken explained:

> [Timken] will develop and supply prototypes ("Muster") which are specially produced for the customer to test, and if

> the customer approves these units, the parties estimate the quantities to be bought and negotiate a fixed selling price. Thereafter, [Timken] provides further sample units (designated by the suffix "M41"), which are produced under normal production conditions, and if the customer approves these samples, [Timken] is fully approved to supply.

Timken did not make a similar disclosure for either channel 2 or 3, thereby suggesting that it consciously did not contemplate selling prototypes under channel 2 or 3. What is more, the customer is an "automobile and other large OEMs," the very customer defined for channel 1 sales. Thus, this evidence, especially taken together, demonstrates that Commerce was reasonable to refuse to reclassify the Prototype Sales from channel 1 to channel 2 or 3.

Lastly, Timken's argument that the small quantity of bearings involved in each of the seventeen disputed transactions weighs in favor of reclassifying the sales under either channel 2 or 3 is unavailing. None of the channels of distribution, as defined by Timken, contain any numeric limitations. Despite this, Timken claims that the average quantity for a channel 1 sale exceeds 14,000 units, but fails to substantiate its claim with any evidence. Furthermore, we presume that the sale of prototypes likely would only include a few units. The customer, after all, would want to confirm that the prototypes function for their intended usage before buying commercial quantities. Thus, that the seventeen al-

legedly miscategorized sales involved a small number of bearings compared to the number typically involved in a commercial sale under channel 1 does not alone require reclassifying the Prototype Sales from channel 1 to channel 2 or 3. Nor does it when taken in view of Timken's other new information.

In sum, we hold that Timken's case before Commerce basically involves a failure of proof; none of the new evidence that Timken submitted adequately supports its position that it initially misclassified seventeen sales. Commerce calculated the dumping margin applicable to the bearings Timken imported in the United States during the review period based upon Timken's original information, which it verified. Although this is a close case, we hold that Commerce's original determination was, on the balance of the old and new evidence, supported by substantial evidence and was not contrary to law. The Court of International Trade, therefore, properly affirmed Commerce's antidumping duty determination based on the original information and its refusal to accept Timken's corrective information.

III. CONCLUSION

We conclude that the Court of International Trade in *Timken I* correctly remanded the case to Commerce for investigation of Timken's new evidence because Timken sought correction after Commerce issued the preliminary results, but before it issued the final results and such corrections are not limited to "clerical" errors only. Because we conclude that Commerce had sufficient factual basis for refusing to make the corrections on remand and be-

cause its original duty determination was supported by substantial evidence and in accordance with law, we affirm the Court of International Trade's decision in *Timken II* upholding Commerce's rejection of Timken's corrective information and its antidumping duty determination based on Timken's original evidence.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 05-1158

TIMKEN U.S. CORPORATION AND TIMKEN NADELLAGER, GMBH, PLAINTIFFS-APPELLANTS,

v.

UNITED STATES, DEFENDANT-APPELLEE.

ORDER

Before: MICHEL, Chief Judge, CLEVENGER, Senior Circuit Judge, and SCHALL, Circuit Judge.

A petition for rehearing having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on April 19, 2006.

FOR THE COURT,

/S/ Jan Horbaly
Jan Horbaly
Clerk

Dated: 04/12/2006

[Filed: April 12, 2006]

APPENDIX C

UNITED STATES COURT OF
INTERNATIONAL TRADE

Slip Op. 04-21

Court No. 00-09-00454

TIMKEN U.S. CORPORATION AND
TIMKEN NADELLAGER GMBH, PLAINTIFFS,

v.

UNITED STATES, DEFENDANT.

March 5, 2004

OPINION

TSOUCALAS, Senior Judge: Plaintiffs, Timken US Corporation[1] ("Timken") and Timken

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[1] This action was originally brought by The Torrington Company and Torrington Nadellager GmbH in September 2000. *See* Summons ¶ 1. The Torrington Company was acquired by the Timken Company on February 18, 2003, and is now known as Timken US Corporation. Timken's German affiliate is now known as Timken Nadellager, GmbH ("TNG"). *See* Disclosure of Corporate

Nadellager, GmbH[2] ("TNG"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging one aspect of the United States Department of Commerce's ("Commerce") determination entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the*

Affiliations & Fin. Interest at 1 (filed with this Court on Feb. 3, 2004). Timken appeared as a respondent in the subject reviews before Commerce and appears before this Court in the same capacity.

[2] This action challenges the final results of the tenth administrative review of antifriction bearings from Germany, which cover CRBs produced by TNG. Cylindrical roller bearings produced by TNG were also subject to the eighth and ninth administrative reviews in which Commerce determined *de minimis* dumping margins for the subject product. *See Final Results of Antidumping Duty Administrative Reviews on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom*, 64 Fed. Reg. 35,590, 35,591 (July 1, 1999); *Final Results of Antidumping Duty Administrative Reviews on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, 63 Fed. Reg. 33,320, 33,321 (June 18, 1998) (collectively "eighth and ninth administrative reviews"). Guerra, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States, defendant.

United Kingdom ("*Final Results*"), 65 Fed. Reg. 49,219 (Aug. 11, 2000). Specifically, plaintiffs contend that Commerce erred by refusing to correct an error in reporting channels of distribution for TNG, an affiliated company of Timken and German producer of cylindrical roller bearings ("CRBs"). Commerce maintains that Timken failed to demonstrate that the error was clerical in nature and argues that the record supports Commerce's finding that the alleged error was either a substantive issue or an error in judgment.

BACKGROUND

The administrative review at issue involves the period of review covering May 1, 1998, through April 30, 1999.[3] *See Final Results*, 65 Fed. Reg. at 49,219. Commerce published the preliminary results of the subject reviews on April 6, 2000. *See Preliminary Results of Antidumping Duty Administrative Reviews, Partial Rescission of Administrative Reviews, and Notice of Intent to Revoke Orders in Part on Antifriction Bearings (Other Than Tapered Roller Bear-*

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[3] Since the administrative review at issue was initiated after December 31, 1994, the applicable law is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (effective January 1, 1995). *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995) (citing URAA § 291(a)(2), (b) (noting effective date of URAA amendments)).

ings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom ("*Preliminary Results*"), 65 Fed. Reg. 18,033. Commerce published the Final Results at issue on August 11, 2000.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a (2000) and 28 U.S.C. § 1581(c) (2000).

STANDARD OF REVIEW

The Court will uphold Commerce's final determination in an antidumping administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); *see NTN Bearing Corp. of Am. v. United States*, 24 CIT 385, 389-90, 104 F. Supp. 2d 110, 115-16 (2000) (detailing Court's standard of review in antidumping proceedings).

DISCUSSION

A. Factual Background

During the tenth administrative review, Commerce instructed Timken to report the channels of distribution for TNG's home market sales. *See* App. Timken's Mem. Supp. R. 56.2 Mot. J. Upon Agency R. ("Timken's App.") Tab 4 at 1. Commerce indicated that "the information [was] necessary to

make appropriate comparisons of sales at the same level of trade or to adjust normal value, if appropriate, when sales are compared at different levels of trade." Def.'s Mem. Opp'n Pls.' Mot. J. Upon Agency R. ("Def.'s Mem.") Ex. 1 at A-4 (emphasis omitted). In response to this request, Timken identified five distribution channels corresponding to customer categories for TNG's home market sales, including: (1) factory to large original equipment manufacturers ("OEMs") ("channel 1"); (2) factory to other OEMs ("channel 2"); (3) factory to distributors ("channel 3"); (4) TNG to OEM customers ("channel 4"); and (5) TNG to distributor customers ("channel 5"). *See* Timken's App. Tab 3 at A-21 — A-24. Timken also described the sales process for each channel of distribution. *See id.*

Commerce eventually "conducted a sales verification" of Timken in February 2000, and subsequently issued an analysis memorandum for the *Preliminary Results* entitled *Issues and Decision Memorandum for the Administrative Reviews of Antifriction Bearings (other than tapered roller bearings) and parts thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom - May 1 1998, through April 30, 1999* ("*Issues & Decision Mem.*"). *See id.* Tab 10 at 1. In its decision memorandum, "Commerce explained that for the five channels of distribution reported by [TNG] in its [home market] sales listing, [a senior import compliance specialist] examined the selling activities, the point in the channel of distribution at which the selling activities occurred, and the types of customers that purchased the foreign like product

from [TNG]." Def.'s Mem. at 5. Commerce determined that three channels of distribution were for home market sales by TNG, and the remaining two channels of distribution were for "resales" by TNG's affiliated marketing entity. *See* Timken's App. Tab 4 at 3. As a result, Commerce re-designated channel 1 as HM1 (home market 1), grouped channels 4 and 5 together and re-designated them HM2 (home market 2) and also grouped channels 2 and 3 together and redesignated them HM3 (home market 3). *See id.* Essentially, Commerce grouped channels 4 and 5 and channels 2 and 3 together upon a determination that the points in which selling activities occurred within these different channels of distribution were indistinguishable. *See id.*

In determining the dumping margin, Commerce used constructed value ("CV") when no sales existed of "an identical or similar model sold in the home market or when the identical or similar model was disregarded as below cost." *Id.* at 7.[4] "Profit was calculated by multiplying the level-of-trade-specific weighted-average profit rate calculated on home market sales made in the ordinary course of

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[4] Under post-URAA law, pursuant to 19 U.S.C. §§ 1677b(a) (1) and 1677(16) (1994), Commerce must first look to identical merchandise in matching the United States model to the comparable home market model. If a determination cannot be satisfactorily made using identical merchandise, Commerce must look to like merchandise—initially under the second category and, if that is not available, under the third category.

trade by the cost of production . . . of the model." *Id.* Based on this analysis, Commerce calculated a dumping margin of 61.60 percent for CRBs produced by TNG. *See id.* at 1; *Final Results*, 65 Fed. Reg. at 49,221; *Preliminary Results*, 65 Fed. Reg. at 18,041.

B. Timken's Contentions

Timken states that in responding to Commerce's request for information, Timken relied on "customer names to classify its home market sales according to distribution channel." Timken's Mem. Supp. R. 56.2 Mot. J. Upon Agency R. ("Timken's Mem.") at 6. As a result, a certain number of transactions were unintentionally reported in channel 1 instead of channel 2 or channel 3. Ultimately, these transactions were grouped into HM1 instead of HM3. *See id.* at 7-13.

According to Timken, these misclassifications can be grouped into three broad fact patterns. First, Timken inadvertently reported a certain number of transactions as sales to large OEMs instead of classifying them as sales to small OEMs. *See id.* at 7. Second, Timken unintentionally reported a certain number of transactions as sales for the production of large original equipment instead of sales for use as replacement parts. *See id.* at 8. Third, Timken mistakenly reported a certain number of transactions as sales to large OEMs instead of labeling them as "units sold as samples, [that] were delivered to the customer's prototype center." *Id.* at 10 (emphasis omitted). "Although Commerce verified [Timken's] home market sales, [Timken argues that Commerce]

did not pursue the classification o[f] individual transactions into their appropriate distribution channels at verification." *Id.* at 11 (citations omitted).

Timken claims that Commerce's subsequent calculation of an abnormally high CV profit rate resulted from these misclassified transactions. *See id.* at 11-12. According to Timken, these transactions only covered a minimal percentage "of all units sold in the [level of trade ("LOT")] (as a percentage of sales quantity reported in the home market sales listing)." *Id.* at 11. Timken maintains that the remaining sales in the LOT were "disregarded" because Commerce found them to have been made at prices below cost of production ("COP"). *See id.* Timken further claims that the calculation of an abnormal CV profit rate caused Commerce to compute an inaccurate dumping margin. *See id.* at 11-12.

During the administrative review, Timken identified these mistakes and requested that Commerce either correct Timken's "inadvertent errors by reclassifying certain home market sales, or . . . in the alternative, combine all home market LOTs in the CV profit calculation and use that rate for home market LOT." *Id.* at 12 (emphasis omitted). Timken supplied supporting documentation and claims that Commerce did not indicate that such information was inadequate, nor did Commerce request additional supporting evidence. *See id.* at 12-13.

In the *Issues & Decision Mem.*, Commerce rejected Timken's arguments that the errors should be

corrected because Timken did not show that these errors were clerical in nature. *See* Timken's App. Tab 10 at 50-52. Timken contends that Commerce is mandated to correct these errors because they were unintentional and because "Commerce's goal in administrative reviews is to determine margins 'as accurately as possible.'" Timken's Mem. at 17 (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)). Timken argues that the present situation involving misclassified channels of distribution is similar to the miscategorized sales situation identified in *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1206-09 (Fed. Cir. 1995). *See* Timken's Mem. at 17-18, 26-31. Timken points out that in NTN, the United States Court of Appeals for the Federal Circuit ("CAFC") held that "Commerce should correct inadvertent 'clerical' errors made by respondents to avoid manifestly unjust results, even if the errors are discovered subsequent to the deadline for submitting information, and even if the error is not obvious from [the] record at the time." *Id.* at 18 (citing *NTN Bearing*, 74 F.3d at 126-09) (emphasis added). Timken also points out that precedent has cautioned Commerce "not to draw distinctions between 'substantive' and 'clerical' errors in an overly narrow manner." *Id.* (citing *World Finer Foods, Inc. v. United States*, 24 CIT 541, 550 (2000)).

While Timken admits that the relevant statute, legislative history and agency regulations do not directly address the issue of inadvertent errors committed by respondents, Timken argues that each supports the proposition that unintentional errors should be corrected. *See id.* at 22-26. Timken also

raises issue with Commerce's position that errors of judgment are distinguishable because such a finding is "inconsistent with the caveat articulated in World Finer Foods that '[w]here the line is difficult to draw between permissible ministerial or clerical error correction and impermissible factual or methodological changes," Commerce should classify such error as clerical. *Id.* at 27 (quoting *World Finer Foods*, 24 CIT at 550).

Finally, Timken applies the test established by Commerce in *Final Results of Antidumping Duty Administrative Reviews of Certain Fresh Cut Flowers From Columbia* ("*Columbian Flowers*"), 61 Fed. Reg. 42,833, 42,834 (Aug. 19, 1996), and cited by Commerce in the Final Results, to the facts of this case and argues that its errors "are analogous to the types of errors Commerce determined to be 'clerical' errors and which were corrected in [*Columbian*] *Flowers*." Timken's Mem. at 30. Accordingly, Timken maintains that Commerce improperly refused to correct the error identified by Timken in the subject review.

C. Analysis

The antidumping statute requires Commerce to calculate dumping margins as accurately as possible in each administrative review. *See Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 25 CIT ___, ___, 178 F. Supp. 2d 1305, 1322 (2001) (citing *Rhone Poulenc*, 899 F.2d at 1191). "[A]ntidumping laws are not punitive in nature, but are designed to remedy the inequities caused by unfair trade prac-

tices." *Allied Tube & Conduit Corp. v. United States*, 24 CIT 1357, 1370, 127 F. Supp. 2d 207, 218 (2000); *see NTN*, 74 F.3d at 1208 (stating that "the antidumping laws are remedial not punitive" (citing *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103-04 (Fed. Cir. 1990))). Although antidumping laws "afford the domestic manufacturer strong protection against dumping," Commerce is still required to "make a fair and equitable valuation, which may [ultimately] reduce the antidumping margin." *Smith-Corona Group v. United States*, 713 F.2d 1568, 1576 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). These two competing purposes seem to conflict with each other. *See American Permac, Inc. v. United States*, 12 CIT 1134, 1137, 703 F. Supp. 97, 100 (1988). On the one hand, Commerce is commissioned to protect the domestic industry from unfair trade practices and on the other, Commerce is responsible for promoting free trade. *See id.* In application, however, the "two purposes of the statute complement, rather than conflict with each other." *Id.*

When applying these notions to the issue at bar, the Court recognizes that Commerce often establishes policies to ensure the consistent procedural application of antidumping laws. *See Allied Tube*, 24 CIT at 1370, 127 F. Supp. 2d at 218-19 (stating that "[f]air and equitable margins are calculated when the administering authorities are consistent in their procedural application of the law"). In the past, Commerce corrected a respondent's own clerical errors only if Commerce "could assess from information already on the record that an error ha[d] been made,

that the error [was] obvious from the record, and that the correction [was] accurate." Def.'s Mem. at 26. As a result of the CAFC's holding in *NTN*,[5] however, Commerce reevaluated its policy for correcting clerical errors of respondents and developed the six-part *Columbian Flowers Test*.[6] In its *Issues & Deci-*

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[5] *NTN* involved the inadvertent use of a code for high precision bearing tolerances rather than the standard precision bearing tolerances and the listing of four sales to foreign customers as sales to domestic customers. *See NTN*, 74 F.3d at 1205. Commerce rejected the respondent's request for correction upon a finding that "the errors were not obvious from the record and that the deadline for submitting new information had expired." *Id.* The CAFC held, however, that the "requirement that the record disclose the error essentially preclude[d] correction of clerical errors made by a respondent. Where clerical personnel of a respondent transpose code numbers, the existing administrative record will not disclose that such error occurred." *Id.* at 1208. The CAFC also held that "while it may be a reasonable exercise of [an agency] to restrict the correction of its own clerical errors to those obvious from the record, the same rule applied to a respondent's errors becomes arbitrary." *Id.*

[6] In *Columbian Flowers*, Commerce stated that it would

> accept corrections of clerical errors under the following conditions: (1) [t]he error in question must be demonstrated to be a clerical error, not a methodological error, an error in judgment, or a substantive error; (2) [Commerce] must be satisfied that the corrective documentation provided in

sion Mem., Commerce explained that Timken failed to satisfy the first and second criteria of this test. See Timken's App. Tab 10 at 50-52.

The first prong of the *Columbian Flowers Test* states that Commerce accepts respondent's corrections if the error in question is demonstrated to be clerical. Clerical errors have been defined as mistakes "made by a clerk or other subordinate, upon whom devolved no duty to exercise judgment, in writing or copying the figures or in exercising his intention." *PPG Indus., Inc. v. United States*, 7 CIT 118, 124 (1984) (citations omitted). Inadvertencies, on the other hand, have been described as "an oversight or involuntary accident, or the result of inattention or carelessness." *Id.* (citing *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 68 Cust. Ct.

> support of the clerical error allegation is reliable; (3) the respondent must have availed itself of the earliest reasonable opportunity to correct the error; (4) the clerical error allegation, and any corrective documentation, must be submitted to [Commerce] no later than the due date for the respondent's administrative case brief; (5) the clerical error must not entail a substantial revision of the response; and (6) the respondent's corrective documentation must not contradict information previously determined to be accurate at verification.

Columbian Flowers ("*Columbian Flowers Test*"), 61 Fed. Reg. at 42,834.

17, 22, 336 F. Supp. 1395, 1399 (1972), *aff'd*, 61 CCPA 90, C.A.D. 1129, 499 F.2d 1277 (1974)).

In its supporting brief, Timken argues that Commerce has applied a broader definition of "clerical errors" in past reviews. In fact, Commerce applied the *Columbian Flowers Test* and accepted the inclusion of a non-subject merchandise sale in the dumping margin as a clerical error in its *Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review and Final Determination Not to Revoke in Part for Canned Pineapple Fruit from Thailand*, 2000 WL 1880665 at Cmt. 6 (Dec. 13, 2000). Commerce also found an error in coding the date of sale for one quarter of a customer's contracts to be clerical in *Final Results of Antidumping Duty Administrative Review of Certain Cold-rolled Carbon Steel Flat Products from the Netherlands*, 64 Fed. Reg. 11,825 (Mar. 10, 1999). However, in neither of these cases, nor in other holdings referenced by Timken, *see* Timken's Mem. at 31, does the respondent commit the same error in two prior reviews. In the present case, Timken admits that it misclassified home market sales of the same subject merchandise in the eighth and ninth administrative reviews, but argues the misclassifications did not result in any meaningful changes to the dumping margins. *See supra* text accompanying note 2. Nonetheless, this Court agrees with Commerce's determination that the error at issue was not clerical. Moreover, the Court does not accept Timken's interpretation of the law that Commerce should correct the error simply because it was inad-

vertent, *see* Timken's Reply Br. at 2, since such a finding would broaden the holding of *NTN*.

Commerce proffers a harsh interpretation of the facts of this case. Commerce states that

> in preparing the data for channels of distribution, as in *prior reviews*, [Timken] relied on the customer names to classify its home market sales according to distribution channel. Thereby, [Timken] exercised judgment, based upon its examination of its own documents and procedures, that sales to particular customers properly belonged in Channel 1 as sales to "large" OEMs, because of the various distribution and sales activities that were incurred with respect to the sales to these "large" OEMs. [Timken's] coding of the sales at issue as sales to "large OEMs," thus, was neither a ministerial nor clerical error, but a deliberate and intentional decision, based upon its actions in prior reviews.

Def.'s Mem. at 28-29 (emphasis in original). Commerce compares the facts of this case with those in *Hambro Auto. Corp. v. United States*, 66 CCPA 113, 117-20, C.A.D. 1231, 603 F.2d 850, 853-55 (1979), and argues that the Court should render the misclassifications an error in judgment or a mistake of law. *See* Def.'s Mem. at 29. Commerce's reliance on *Hambro* is misplaced.

Hambro concerned an importer's challenge to a denial of protests filed after the government refused the importer's request for reliquidation of certain entries. *See Hambro*, 66 CCPA at 117, 603 F.2d at 850. The alleged errors involved statutory values that were calculated by subtracting (rather than adding) cost of export divisions from home market cost figures. *See Hambro*, 66 CCPA at 188-19, 603 F.2d at 854. In *Hambro*, the "errors" were deemed a mistake of law because the importer was fully aware of its general expenses and profits, but believed the legal consequences of such values to be different than they were. *See Hambro*, 66 CCPA at 117-20, 603 F.2d at 853-55. Unlike the importer in *Hambro*, Timken did not realize that it misclassified certain home market sales, nor was Timken cognizant of the legal consequences of its error until the dumping margins were calculated in the *Preliminary Results*. *See* Timken's Mem. at 17-36.

A complete review of the confidential material of this case reveals a situation where rigid compliance with the *Columbian Flowers Test* would render a grossly erroneous dumping margin. Timken's misclassified transactions covered only a minuscule percentage of all units sold in the LOT. *See* Timken's Mem. at 7-10 (proprietary version). The remaining sales in the LOT were disregarded in Commerce's profit calculation because they were to be sold at prices below the COP. *See id.* Ultimately, Commerce calculated an extremely high CV profit rate and a dumping margin of 61.60 percent based only upon a few misclassified sales. *See* Timken's App.

Tabs 2, 4, 7 (proprietary version). Timken contends that it "had no knowledge or reason to believe" that its reliance on customer names would result in any misclassifications. Timken's Mem. at 6. Commerce argues that since Timken used the same reporting method in the eighth and ninth reviews, Timken's action in the tenth review was indeed calculated. *See* Def.'s Mem. at 28-29. Since the classification of Timken's home market sales was never an issue addressed in the eighth and ninth administrative reviews, this Court cannot reach the conclusion that Timken intentionally misclassified transactions to attain a desired dumping margin.

The Court, alternatively, must balance the interest of protecting Commerce's authority to create and implement policy to protect the domestic industry from unfair trade practices, and its correlating obligation "to calculate the most accurate dumping margins possible." *Shandong Huarong Gen. Corp. v. United States*, 25 CIT ___, ___, 159 F. Supp. 2d 714, 727 (2001), *aff'd*, 2003 U.S. App. LEXIS 466 (Fed. Cir. Jan. 10, 2003), *reh'g denied en banc*, 2003 U.S. App. LEXIS 6759, *1 (Fed. Cir. Mar. 18, 2003). Commerce directed Timken to provide a description of its channels of distribution and sales process and clarified that the information is "intended to provide [Commerce] with the information necessary to make appropriate comparisons of sales at the same level of trade or to adjust [NV,] if appropriate, when sales are compared at different levels of trade." Timken's App. Tab 10 at 50. Commerce also cautioned Timken that the information was of "critical importance." These instructions are intended to solicit accurate

information that Commerce must utilize to calculate the antidumping margins. *Cf. Acciai Speciali Terni, S.p.A. v. United States*, 25 CIT ___, ___, 142 F. Supp. 2d 969, 982 (2001) (stating that "[i]t is respondent's obligation to supply Commerce with accurate information" (citations omitted)). Had Timken followed these instructions, perhaps this case would not be before this Court. The Court cautions Timken to pay closer attention to the manner in which it classifies and reports future home market sales transactions. Commerce, with its limited resources, cannot be expected "to serve as a surrogate to guarantee the correctness of submissions." *Id.* (quoting *Yamaha Motor Co. v. United States*, 19 CIT 1349, 1359, 910 F. Supp. 679, 687 (1995)). Although the Court recognizes that the burden falls on a respondent to provide accurate information, it is unreasonable to believe that a respondent can do so in each and every review without committing occasional errors. *See Shandong*, 25 CIT at ___, 159 F. Supp. 2d at 727 (holding that a restriction of Commerce's power to correct ministerial errors would undermine its "underlying obligation to calculate the most accurate dumping margins possible").

Upon publication of the estimated dumping margin in the *Preliminary Results*, Timken "reexamined its submission and discovered the inadvertent channel of distribution classification errors (re[garding] home market LOT 1)." Timken's Mem. at 12. Timken thereafter submitted documentation clarifying the correct channel of distribution classifications. *See id.* Commerce contends that such documentation is not reliable and, therefore, Tim-

ken's clerical error claims also fail to satisfy the second prong of the *Columbian Flowers Test*. Commerce determined that Timken's purchase orders, invoices, and notes (some handwritten) were unreliable because "certain record evidence conflict[ed] with" the supplemental information. Timken's App. Tab 10 at 52. In its supporting brief, Commerce states:

> The conflict, of course, existed between [Timken's] original description of distribution channel 1 . . . which included prototype and sample sales . . . and [Timken's] request re-categorization of the prototype and sample sales at issue as sales to "other" OEMs or sales to "distributors." There was also conflict between Commerce's conclusions in its verification report and its preliminary sales analysis memorandum that [Timken's] representations of its distribution channels, including channel 1, were consistent with its response and that [Timken] had reported the customer category and channel of distribution fields accurately in its sales databases. Commerce simply found "no information on the record that specifically precludes the transactions in question from being categorized as sales to large OEMs."

Def.'s Mem. at 37 (quoting Timken's App. Tab 10 at 52). The Court, however, cannot discern what record

evidence Commerce is referring to. In this case, had Timken properly classified the transactions at issue in its response to Commerce's questionnaire, it would have categorized the sales as distribution channel 2 or 3 because the customers did not buy the units for use in producing large original equipment. *See* Timken's App. Tabs 7 & 15 (proprietary version). Thus, any information submitted by Timken to correct the misclassifications would conflict with the original data supplied by Timken. In the interest of implementing the overarching principle of the antidumping statute, that is, to determine dumping margins as accurately as possible, *see Fujian*, 25 CIT at ___, 178 F. Supp. 2d at 1322, the Court remands this case to Commerce to further investigate the claims raised during the administrative proceeding. Any other finding would render a punitive result in contravention to *Allied Tube*, 24 CIT at 1370, 127 F. Supp. 2d at 218.

CONCLUSION

The error committed by Timken is not clerical. This case could have been avoided had Timken followed the instructions of Commerce and classified its sales transactions properly. Nonetheless, the Court must consider the overarching principle of the antidumping statute in rendering a decision on this issue. It is undisputed that Commerce's goal in administrative reviews is to determine antidumping margins "as accurately as possible." *Rhone Poulenc*, 899 F.2d at 1191. In this case, an erroneous dumping margin was calculated as a result of a few misclassified transactions reported by Timken. These errors were identified upon publication of the Pre-

liminary Results, and Commerce was provided with supporting documentation. Since the Court finds the facts of this case to be distinct from prior case law, the Court remands this case to Commerce for further investigation and to make any corrections necessary to attain the most accurate antidumping margin.

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE

Dated: March 5, 2004
New York, New York

UNITED STATES COURT OF
INTERNATIONAL TRADE

Court No. 00-09-00454

TIMKEN U.S. CORPORATION AND
TIMKEN NADELLAGER, GMBH, PLAINTIFFS,

v.

UNITED STATES, Defendant.

ORDER

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in accordance with said decision, it is hereby

ORDERED that the United States Department of Commerce (1) further investigate the claims raised during the administrative proceeding with regards to the error committed by the plaintiffs in reporting home market sales according to channels of distribution for Timken Nadellager, GmbH; and (2) make any corrections necessary to attain the most accurate antidumping margin and not inconsistent with this opinion; and it is further

ORDERED that the remand results are due within ninety (90) days of the date that this opinion is entered. Any responses or comments are due

within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date the responses or comments are due.

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE

Dated: March 5, 2004
New York, New York

APPENDIX D

UNITED STATES COURT OF
INTERNATIONAL TRADE

Slip Op. 04-135

Court No. 00-09-00454

TIMKEN U.S. CORPORATION AND
TIMKEN NADELLAGER GMBH, PLAINTIFFS,

v.

UNITED STATES, DEFENDANT.

October 29, 2004

OPINION

TSOUCALAS, Senior Judge:

I. STANDARD OF REVIEW

The Court will uphold the United States Department of Commerce's ("Commerce") redetermination pursuant to the Court's remand unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is "more than a mere scintilla. It means such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the [same] evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

II. BACKGROUND

The relevant facts and procedural history in this case are set forth in the Court's remand opinion, *Timken U.S. Corp. v. United States*, 28 CIT ___, 318 F. Supp. 2d 1271 (2004). A brief summary is included here.

Commerce published a final determination entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom* ("*Final Results*"), 65 Fed. Reg. 49,219 (Aug. 11, 2000). The period of review covered by the *Final Results* is May 1, 1998, to April 30, 1999. *See id.* On June 15, 2001, the plaintiffs, Timken U.S. Corporation and Timken Nadellager, GmbH (collectively, "Timken") moved pursuant to

USCIT R. 56.2 for judgment upon the agency record challenging one aspect of the *Finals Results*.[1] See Timken's Mem. Supp. R. 56.2 Mot. J. Upon Agency R. Specifically, at issue was whether Commerce properly rejected evidence submitted by Timken after the *Final Results* were published to correct an alleged error in the antidumping margin ("post-*Final Results* invoices").[2]

On March 5, 2004, this Court issued a remand order directing Commerce to further investigate the

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[1] This action was originally brought by The Torrington Company and Torrington Nadellager GmbH in September 2000. *See* Summons ¶ 1. The Torrington Company was acquired by the Timken Company on Feb. 18, 2003, and is now known as Timken U.S. Corporation. Timken's German affiliate is now known as Timken Nadellageer, GmbH. *See* Disclosure of Corporate Affiliations & Fin. Interest at 1 (filed with this Court on Feb. 3, 2004).

[2] After the *Final Results* were published, Timken's antidumping margin was considerably higher than other companies in the review prompting Timken to re-examine its internal classification procedures and questionnaire responses submitted to Commerce. *See Timken*, 28 CIT __, 318 F. Supp. 2d at 1273-75. Claiming several internal mis-classification errors, Timken requested Commerce to change the published antidumping margin and offered invoices to substantiate its claim. *See id.* Commerce declined to accept these invoices. *See id.* Commerce found that the errors were not clerical in nature and the invoices were offered well beyond the administrative deadline for submitting new factual information. *See id.* Timken subsequently filed its 56.2 motion. *See id.*

claims raised during the administrative proceeding with regards to the error committed by the plaintiffs in reporting home-market sales according to channels of distribution for Timken and *make any corrections necessary* to attain the most accurate antidumping margin. *See Timken*, 28 CIT at ___, 318 F. Supp. 2d at 1279 (*emphasis added*). On June 7, 2004, Commerce submitted its Final Results of Redetermination Pursuant to Court Remand ("*Remand Determination*"). On July 7, 2004, Timken filed comments regarding the *Remand Determination*. *See* Pl.'s Comments on the Final Results of Redetermination Pursuant to Ct. Remand ("Timken's Comments"). Commerce then filed a response to Timken's comments on July 30, 2004. *See* Def.'s Resp. to Pl.' Comments Regarding the Dep't of Commerce's Remand Determination.

III. DISCUSSION

Timken bears the burden of showing that the post-*Final Results* evidence changes the disputed channels of distribution ("Channels") classifications, thus changing the published antidumping margin. *See NTN Bearing Corp. of Am. v. United States*, 19 CIT 1165, 1174, 903 F. Supp. 62, 70 (1995) ("A party claiming a level-of-trade adjustment has the burden of proving entitlement to the adjustment."). The Channels and associated home-market sales reported by Timken, on a questionnaire during the administrative review process, determined the levels of trade ("LOT"), which was ultimately used to calculate the antidumping margin. *See Timken*, 28 CIT at ___, 318 F. Supp. 2d at 1273. Timken reported five

Channels in its home-market sales listing, which Commerce grouped into three LOT. *See id.* Channel 1 consisted of sales to large original equipment manufacturers ("OEMs") and was designated as LOT 1; Channels 2 and 3 consisted of sales to other OEMs and sales distributors, respectively, and was designated as LOT 2; and Channels 4 and 5 consisted of sales to OEMs and distributors, respectively, of an affiliated marketing entity and was designated as LOT 3. *See id.*; *Remand Determination* at 9-10. Timken alleges that three types of classification errors occurred. Accordingly, Timken argues that certain sales should be moved from Channel 1 into a different Channel.

A. Commerce Properly Classified the Sales of Sample Units in Channel 1

1. Timken's Contentions

Of the three classification errors in dispute, the first deals with products sold as sample or prototype units. *See Remand Determination* at 11. Timken asserts that these sample sales were mistakenly reported as sales to large OEMs and consequently classified in Channel 1. *See Timken*, 28 CIT at ___, 318 F. Supp. 2d at 1274; Timken's Comments at 6. Timken asserts that the sales are samples and were not purchased by customers to produce original equipment. *See Remand Determination* at 11. As evidence, Timken submitted invoices to Commerce which designate the sales at issue as samples and indicate delivery to the customer's prototype location. *See id.* Accordingly, Timken argues that these

sales should be reclassified into Channel 2 or 3. See Timken's Comments at 6.

Timken also argues that under *World Finer Foods, Inc. v. United States*, 24 CIT 541 (June 26, 2000), Commerce cannot "preempt correction by imposing evidentiary standards on the corrected submission which exceed what was required for the original (uncorrected) submission." Timken's Comments at 4. Timken states that the post-*Final Results* invoices are sufficient evidence to support reclassifying the sample sales to Channel 2 or 3. See id. at 4-5. Timken asserts that Commerce has impliedly required additional proof other than the post-*Final Results* invoices, contrary to *World Finer Foods*. *See id.*

2. Commerce's Contentions

Commerce explains that in determining whether home-market sales are at a different LOT than United States sales, it examines comparable stages in the marketing process and selling functions along the Channels. *See Remand Determination* at 7. After reviewing Timken's submissions, Commerce asserts that the sales of sample units are correctly classified in Channel 1. *See id.* at 11. Commerce notes that sample sales are described only in the Channel 1 classification (sales to large OEMs) and not in Channel 2 or 3 classifications. *See id.* at 11-12. Commerce argues that the invoices themselves further reiterate the original classification made by Timken because the post-*Final Results* invoices are marked as sales for sample units. *See id.* at 13. Moreover, Commerce maintains that the original

classification is accurate because Commerce verified Timken's questionnaire responses, including the descriptions of the marketing stages and selling functions associated with each LOT. *See id.* Commerce asserts that Timken has failed to produce evidence demonstrating that the sample units were not bought or later used to produce original equipment. *See id.* at 14.

Furthermore, Commerce contends that it has not imposed a higher evidentiary standard. *See Remand Determination* at 19-20. Rather, Commerce has conducted an analysis to determine whether record evidence supports reclassifying the disputed transactions into a different Channel. *See id.* at 20. Commerce argues that "[i]n accordance with [its] statutory obligation, [Commerce has] focused [its] analysis on the associated marketing stages and selling functions." *Id.*; *see generally* 19 CFR § 351.412(c)(2) (1999). Commerce determined that the record evidence, including the post-*Final Results* invoices, does not support a reclassification of the claimed errors. *See Remand Determination* at 21.

Moreover, Commerce argues that Timken's application of *World Finer Foods* is without merit. The Court's focus in that case was the difference between verified and unverified submissions in an administrative review and here, Commerce verified Timken's questionnaire responses during the administrative review. *See Remand Determination* at 21. Courts must rely on the finality of verification findings, otherwise such findings could be attacked as less credible. *See id.* (citing *FAG Kugelfischer Georg Schafer AG v. United States*, 25 CIT 74, 106-7, 131 F.

Supp. 2d 104, 133 (2001)). Here, Commerce verified Timken's questionnaire responses as part of the administrative review and properly relied upon the verification report during the redetermination. *See id.* Thus, Commerce concludes that reclassifying the sample sales would not obtain a more accurate dumping margin. *See id.*

3. Analysis

The Court finds that Commerce's determination regarding the post-*Final Results* invoices and Timken's questionnaire responses reasonably support the original classification. Timken argues that the post-*Final Results* invoices conclusively demonstrate that the sample sales should be classified into Channel 2 or 3. While "corrective" information submitted after the completed administrative review may contradict previously submitted questionnaire information, Timken confirmed the Channel descriptions during Commerce's verification. Accordingly, Timken's Channel descriptions must be considered credible because of the Court's due deference given to verification reports. *See FAG Kugelfischer*, 25 CIT at 106-7, 131 F. Supp. 2d at 133 (stating that not giving deference "would leave every verification effort vulnerable to successive subsequent attacks, no matter how credible the evidence and no matter how burdensome on the agency further inquiry would be") (citations omitted). The Court will not supersede Commerce's conclusions if Commerce reasonably verifies the information submitted during the administrative review and the verification is supported by substantial evidence. *See id.* Submissions made after the *Final Results* are issued are an attempt to re-

classify specific sales into a different Channel, not to change the Channel descriptions.[3] Merely submitting invoices marked as sample sales does not fulfill Timken's burden. Such evidence fails to adequately describe the selling or marketing stages required to reclassify those sales from Channel 1 into Channel 2 or 3. *See NTN*, 19 CIT at 1174, 903 F. Supp. at 70; *see also* 19 CFR § 351.412(c)(2) (stating that Commerce "will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent)"). Accordingly, Commerce has reasonably determined that the sample sales are properly classified in Channel 1.

The Court is also unpersuaded that Commerce is attempting to hold Timken to an excessive evidentiary standard. Timken's interpretation of *World Finer Foods* is flawed. *World Finer Foods* speaks to the reliability of corrective information proffered postreview when there was no verification of submissions during the administrative review. *See World Finer Foods*, 24 CIT at 550 ("Ordinarily, there is no verification of submissions in an administrative review. Therefore, there is no reason for Commerce to infer greater reliability in the information initially submitted as opposed to the information submitted for corrective purposes."). When a verification has occurred, as it has here, the verified information

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[3] If the Channel descriptions are incomplete or incorrect, then Timken should have argued and presented evidence substantiating such a claim.

must be considered more reliable than unverified information. *See id.*; *see also FAG Kugelfischer*, 25 CIT at 106-7, 131 F. Supp. 2d at 133. Failing to give due deference to verified information would be a tragic waste of time, resources, and energy with seemingly no end to the administrative review process. Furthermore, the facts in *World Finer Foods* dealt with a respondent's submission of information to correct clerical or ministerial errors, which this Court has already stated is not the situation here. *See Timken*, 28 CIT at ___, 318 F. Supp. 2d at 1279.

Timken bears the burden of showing sufficient evidence meriting an adjustment. *See NTN*, 19 CIT at 1174, 903 F. Supp. at 70. The Court agrees that the invoices submitted by Timken are of the kind of evidence that should be sufficient to support its claim. The Court, however, finds that the invoices must fit within the verified Channel descriptions from the questionnaire. Moreover, Commerce has reasonably explained why the post-Final Results invoices do not support reclassifying the sample sales into another Channel.

B. Commerce Properly Classified Certain Sales to Large Rather Than to Small OEMs in Channel 1

1. Timken's Contentions

The second alleged classification error involves certain sales classified in Channel 1 as sales to a large OEM of auto-parts. *See* Timken's Comments at 7. Timken argues that Commerce should have classified these sales in Channel 2 as sales to a

"small" OEM. *See Remand Determination* at 14. Timken asserts the "sales were shipped to a factory division of a large OEM that is involved in activities [that Timken] associates with small OEMs." *Id.* Timken states that it erred when making its internal classification because the customers had similar names. See Timken's Comments at 7. As evidence of this error, Timken submitted invoices and corresponding purchase orders showing that the sales in dispute were shipped to a small OEM. *See Remand Determination* at 14. Timken accordingly requests that Commerce reclassify these sales into Channel 2. See id.

2. Commerce's Contentions

Commerce asserts that Timken's claim to reclassify these sales from a large to a small OEM rest upon the size of the OEM's end product. *See Remand Determination* at 15 & 19. "Large" actually refers to the size of the manufacturer, regardless of the size of the end product. *See id.* at 7. Timken did not submit "factual information to substantiate that the party identified on the invoice should be considered a small OEM as opposed to a large OEM" to warrant a reclassification. *Id.* at 14-15. Furthermore, Timken's claim does not focus on the marketing stage and selling functions, which is how Commerce differentiates between LOT. *See id.* Accordingly, Commerce argues that Timken failed to meet its burden.

3. Analysis

Timken has the burden to show a reclassification is warranted. *See NTN*, 19 CIT at 1174, 903 F.

Supp. at 70. Merely submitting invoices, written in German with scant explanations, is not sufficient to explain why the sales to these large OEMs should be reclassified in Channel 2. Timken claims that these sales were shipped to a factory division of a large OEM. Commerce, however, has reasonably explained why the invoices inadequately describe the marketing stages and selling functions of the sales to classify them as sales to a small OEM. Commerce even admits that bifurcation of sales to a single customer could be classified into different Channels. *See Remand Determination* at 15. If bifurcated, then sales made to a division of a large OEM could be classified as sales to a small OEM. Respondent still bears the burden of showing that a bifurcation is warranted. Here, Timken has not produced evidence showing the need for bifurcation. Furthermore, Timken did not challenge Commerce's explanation that Channels are defined by the size of different customers and not by the size of the end product. Accordingly, the Court finds Commerce's explanation is reasonable and supported by substantial evidence.

C. Commerce Properly Classified the Sales of Replacement Parts in Channel 1

1. Timken's Contentions

The third alleged classification error deals with replacement parts sold to a large OEM and classified under Channel 1. *See Remand Determination* at 15-16. Timken asserts that these sales were for replacement, repair, or spare parts; not for the manufacture of original equipment. *See id.* Rather

than being classified in Channel 1, Timken claims that the replacement parts should have been classified in Channel 3. *See id.* at 16. To substantiate its claim, Timken submitted invoices internally marked in different ways to indicate that the products sold were to be used as replacement parts. *See id.* at 15-16.

2. Commerce's Contentions

Commerce asserts that after reviewing the invoices and questionnaire responses, a reclassification to Channel 3 is unsupported. *See Remand Determination* at 16. Timken has failed to explain the marketing stages or selling functions of the replacement parts and how such sales would merit a reclassification to Channel 3.[4] *See id.* at 20. Furthermore, the invoices do not support the type of sales described in Channel 3 activities, which are sales to distributors or competing producers. *See id.* at 16-17. Commerce argues that the invoices submitted do not substantiate Timken's claim that the products were used only as replacement parts and not for normal production activities. *See id.* at 17.

3. Analysis

Timken has the burden to show that the products were indeed marketed and sold as replace-

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[4] Such parts were originally sold through Channel 1 "presumably after the requisite plant certification." *See Remand Determination* at 20.

ment parts. *See NTN*, 19 CIT at 1174, 903 F. Supp. at 70. A mere notation or shipping code on an invoice was deemed inadequate by Commerce for explaining the marketing and selling functions associated with these sales. *See Remand Determination* at 15-17. Commerce has repeatedly stated that its focus, when determining LOT and Channels, is the marketing and selling functions associated with home-market sales. *See id.* at 15 & 19. To reclassify certain sales into another Channel, Timken must focus on the marketing stages. *See* 19 CFR § 351.412(c)(2). While replacement parts are not listed in the Channel 3 description, they are also not in the Channel 1 or 2 descriptions. Thus, Timken's argument, which they have failed to make, must also include why the replacement sales are more appropriately classified in Channel 3 as opposed to Channel 1. Accordingly, the Court finds that Commerce's interpretation is reasonable because Commerce has defined Channels on the size of buyers within each consumer group.

IV. CONCLUSION

Commerce has sufficiently met its burden of reviewing the disputed classifications with the post-*Final Results* invoices submitted by Timken. Commerce has also provided a reasonable explanation of its determination that the antidumping margin is as

accurate as possible with no need to make further corrections. Judgment will be entered accordingly.

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE

Dated: October 29, 2004
New York, New York

UNITED STATES COURT OF
INTERNATIONAL TRADE

Court No. 00-09-00454

TIMKEN U.S. CORPORATION AND
TIMKEN NADELLAGER, GMBH, PLAINTIFFS,

v.

UNITED STATES, Defendant.

JUDGMENT

This Court, having received and reviewed the United States Department of Commerce's Final Results of Redetermination Pursuant to Court Remand ("*Remand Determination*") pursuant to *Timken U.S. Corp. v. United States*, 28 CIT ___, 318 F. Supp. 2d 1271 (2004), and the Court, after due deliberation, having rendered a decision herein; now, in accordance with said decision, it is hereby

ORDERED that the *Remand Determination* is affirmed in its entirety, and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE

Dated: October 29, 2004
New York, New York

APPENDIX E

STATUTORY PROVISIONS

19 U.S.C. § 1516a. Judicial review in countervailing duty and antidumping duty proceedings

(a) Review of determination

(1) Review of certain determinations

Within 30 days after the date of publication in the Federal Register of—

(A) a determination by the administering authority, under 1671a(c) or 1673a(c) of this title, not to initiate an investigation,

(B) a determination by the Commission, under section 1675(b) of this title, not to review a determination based upon changed circumstances,

(C) a negative determination by the Commission, under section 1671b(a) or 1673b(a) of this title, as to whether there is reasonable indication of material injury, threat of material injury, or material retardation, or

(D) a final determination by the administering authority or the Commission under section 1675(c)(3) of this title,

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United

States Court of International Trade by filing concurrently a summons and complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

(2) Review of determinations on record

(A) In general

Within thirty days after--

(i) the date of publication in the Federal Register of--

(I) notice of any determination described in clause (ii), (iii), (iv), (v), or (viii) of subparagraph (B),

(II) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B), or

(III) notice of the implementation of any determination described in clause (vii) of subparagraph (B),

or

(ii) the date of mailing of a determination described in clause (vi) of subparagraph (B),

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International

Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

(B) Reviewable determinations

The determinations which may be contested under subparagraph (A) are as follows:

(i) Final affirmative determinations by the administering authority and by the Commission under section 1671d or 1673d of this title, including any negative part of such a determination (other than a part referred to in clause (ii)).

(ii) A final negative determination by the administering authority or the Commission under section 1671d or 1673d of this title, including, at the option of the appellant, any part of a final affirmative determination which specifically excludes any company or product.

(iii) A final determination, other than a determination reviewable under paragraph (1), by the administering authority or the Commission under section 1675 of this title.

(iv) A determination by the administering authority, under section 1671c or 1673c of this title, to suspend an anti-

dumping duty or a countervailing duty investigation, including any final determination resulting from a continued investigation which changes the size of the dumping margin or net countervailable subsidy calculated, or the reasoning underlying such calculations, at the time the suspension agreement was concluded.

(v) An injurious effect determination by the Commission under section 1671c(h) or 1673c(h) of this title.

(vi) A determination by the administering authority as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order.

(vii) A determination by the administering authority or the Commission under section 3538 of this title concerning a determination under subtitle IV of this chapter.

(viii) A determination by the Commission under section 1675b(a)(1) of this title.

(3) Exception

Notwithstanding the limitation imposed by paragraph (2)(A)(i)(II) of this subsection, a final affirmative determination by the administering authority under section 1671d or 1673d of this

title may be contested by commencing an action, in accordance with the provisions of paragraph (2)(A), within thirty days after the date of publication in the Federal Register of a final negative determination by the Commission under section 1671d or 1673d of this title.

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(b) Standards of review

(1) Remedy

The court shall hold unlawful any determination, finding, or conclusion found--

(A) in an action brought under subparagraph (A), (B), or (C) of subsection (a)(1) of this section, to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or

(B)(i) in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law, or

(ii) in an action brought under paragraph (1)(D) of subsection (a) of this section, to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

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19 U.S.C. § 1673. Imposition of antidumping duties

If—

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that—

(A) an industry in the United States-- (i) is materially injured, or (ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise. For purposes of this section and section 1673d(b)(1) of this title, a reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of the merchandise.

19 U.S.C. § 1675. Administrative review of determinations

(a) Periodic review of amount of duty

(1) In general

At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 \1\ of this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall—

(A) review and determine the amount of any net countervailable subsidy,

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and

(C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net countervailable subsidy or dumping margin involved in the agreement,

and shall publish in the Federal Register the results of such review, together with notice of

any duty to be assessed, estimated duty to be deposited, or investigation to be resumed.

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(3) Time limits

(A) Preliminary and final determinations

The administering authority shall make a preliminary determination under subparagraph (A), (B), or (C) of paragraph (1) within 245 days after the last day of the month in which occurs the anniversary of the date of publication of the order, finding, or suspension agreement for which the review under paragraph (1) is requested, and a final determination under paragraph (1) within 120 days after the date on which the preliminary determination is published. If it is not practicable to complete the review within the foregoing time, the administering authority may extend that 245-day period to 365 days and may extend that 120-day period to 180 days. The administering authority may extend the time for making a final determination without extending the time for making a preliminary determination, if such final determination is made not later than 300 days after the date on which the preliminary determination is published.

(B) Liquidation of entries

If the administering authority orders any liquidation of entries pursuant to a review under paragraph (1), such liquidation shall be made promptly and, to the greatest extent practicable, within 90 days after the instructions to Customs are issued. In any case in which liquidation has not occurred within that 90-day period, the Secretary of the Treasury shall, upon the request of the affected party, provide an explanation thereof.

(C) Effect of pending review under section 1516a

In a case in which a final determination under paragraph (1) is under review under section 1516a of this title and a liquidation of entries covered by the determination is enjoined under section 1516a(c)(2) of this title or suspended under section 1516a(g)(5)(C) of this title, the administering authority shall, within 10 days after the final disposition of the review under section 1516a of this title, transmit to the Federal Register for publication the final disposition and issue instructions to the Customs Service with respect to the liquidation of entries pursuant to the review. In such a case, the 90-day period referred to in subparagraph (B)

shall begin on the day on which the administering authority issues such instructions.

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(d) Revocation of order or finding; termination of suspended investigation

(1) In general

The administering authority may revoke, in whole or in part, a countervailing duty order or an antidumping duty order or finding, or terminate a suspended investigation, after review under subsection (a) or (b) of this section. The administering authority shall not revoke, in whole or in part, a countervailing duty order or terminate a suspended investigation on the basis of any export taxes, duties, or other charges levied on the export of the subject merchandise to the United States which are specifically intended to offset the countervailable subsidy received.

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(e) Hearings

Whenever the administrative authority or the Commission conducts a review under this section, it shall, upon the request of an interested party, hold a hearing in accordance with section 1677c(b) of this title in connection with that review.

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19 U.S.C. § 1677. Definitions; special rules

For purposes of this subtitle—

(1) Administering authority

The term "administering authority" means the Secretary of Commerce, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority under this subtitle are transferred by law.

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(35) Dumping margin; weighted average dumping margin

(A) Dumping margin

The term "dumping margin" means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.

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19 U.S.C. § 1677c. Hearings

(b) Procedures.--Any hearing required or permitted under this subtitle shall be conducted after notice published in the Federal Register, and a transcript of the hearing shall be prepared and made available to the public. The hearing shall not be subject to the provisions of subchapter II of chapter 5 of title 5, or to section 702 of such title.

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19 U.S.C. § 1677m. Conduct of investigations and administrative reviews

(d) Deficient submissions

If the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle. If that person submits further information in response to such deficiency and either—

(1) the administering authority or the Commission (as the case may be) finds that such response is not satisfactory, or

(2) such response is not submitted within the applicable time limits,

then the administering authority or the Commission (as the case may be) may, subject to subsection (e) of this section, disregard all or part of the original and subsequent responses.

APPENDIX F

REGULATIONS

19 C.F.R. § 351.106. *De minimis* net countervailable subsidies and weighted-average dumping margins disregarded.

(c) *Reviews and other determinations—*

(1) *In general.* In making any determination other than a preliminary or final antidumping or countervailing duty determination in an investigation (see paragraph (b) of this section), the Secretary will treat as *de minimis* any weighted- average dumping margin or countervailable subsidy rate that is less than 0.5 percent *ad valorem*, or the equivalent specific rate.

(2) *Assessment of antidumping duties.* The Secretary will instruct the Customs Service to liquidate without regard to antidumping duties all entries of subject merchandise during the relevant period of review made by any person for which the Secretary calculates an assessment rate under Sec. 351.212(b)(1) that is less than 0.5 percent *ad valorem*, or the equivalent specific rate.

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19 C.F.R. § 351.213. Administrative review of orders and suspension agreements under section 751(a)(1) of the Act.

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(h) *Time limits*— (1) *In general.* The Secretary will issue preliminary results of review (see Sec. 351.221(b)(4)) within 245 days after the last day of the anniversary month of the order or suspension agreement for which the administrative review was requested, and final results of review (see Sec. 351.221(b)(5)) within 120 days after the date on which notice of the preliminary results was published in the Federal Register.

(2) *Exception.* If the Secretary determines that it is not practicable to complete the review within the time specified in paragraph (h)(1) of this section, the Secretary may extend the 245-day period to 365 days and may extend the 120-day period to 180 days. If the Secretary does not extend the time for issuing preliminary results, the Secretary may extend the time for issuing the final results from 120 days to 300 days.

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19 C.F.R. § 351.221. Review procedures.

(b) *In general.* After receipt of a timely request for a review, or on the Secretary's own initiative when appropriate, the Secretary will:

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(2) Before or after publication of notice of initiation of the review, send to appropriate interested parties or other persons (or, if appropriate, a sample of interested parties or other persons) questionnaires requesting factual information for the review;

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(4) Issue preliminary results of review, based on the available information, and publish in the Federal Register notice of the preliminary results of review that include:

(i) The rates determined, if the review involved the determination of rates; and

(ii) An invitation for argument consistent with Sec. 351.309;

(5) Issue final results of review and publish in the Federal Register notice of the final results of review that include the rates determined, if the review involved the determination of rates;

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19 C.F.R. § 351.222. Revocation of orders; termination of suspended investigations.

(b) *Revocation or termination based on absence of dumping.*

***

(2)(i) In determining whether to revoke an antidumping duty order in part, the Secretary will consider:

(A) Whether one or more exporters or producers covered by the order have sold the merchandise at not less than normal value for a period of at least three consecutive years;

(B) Whether, for any exporter or producer that the Secretary previously has determined to have sold the subject merchandise at less than normal value, the exporter or producer agrees in writing to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Secretary concludes that the exporter or producer, subsequent to the revocation, sold the subject merchandise at less than normal value; and

(C) Whether the continued application of the antidumping duty order is otherwise necessary to offset dumping.

(ii) If the Secretary determines, based upon the criteria in paragraphs (b)(2)(i)(A) through (C) of this section, that the antidumping duty order as to those producers or exporters is no longer warranted, the Secretary will revoke the order as to those producers or exporters.

***

(e) *Request for revocation or termination*—(1) *Antidumping proceeding.* During the third and subsequent annual anniversary months of the publication of an antidumping order or suspension of an antidumping investigation, an exporter or producer may request in writing that the Secretary revoke an order or terminate a suspended investigation under paragraph (b) of this section with regard to that person if the person submits with the request:

(i) The person's certification that the person sold the subject merchandise at not less than normal value during the period of review described in Sec. 351.213(e)(1), and that in the future the person will not sell the merchandise at less than normal value;

(ii) The person's certification that, during each of the consecutive years referred to in paragraph (b) of this section, the person sold the subject merchandise to the United States in commercial quantities; and

(iii) If applicable, the agreement regarding reinstatement in the order or suspended investigation

described in paragraph (b)(2)(iii) of this section.

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19 C.F.R. § 351.301. Time limits for submission of factual information.

(a) *Introduction.* The Department obtains most of its factual information in antidumping and countervailing duty proceedings from submissions made by interested parties during the course of the proceeding. This section sets forth the time limits for submitting such factual information, including information in questionnaire responses, publicly available information to value factors in nonmarket economy cases, allegations concerning market viability, allegations of sales at prices below the cost of production, countervailable subsidy allegations, and upstream subsidy allegations. Section 351.302 sets forth the procedures for requesting an extension of such time limits. Section 351.303 contains the procedural rules regarding filing, format, translation, service, and certification of documents.

***

(c) *Time limits for certain submissions—*

***

(2) *Questionnaire responses and other submissions on request.* (i) Notwith-

standing paragraph (b) of this section, the Secretary may request any person to submit factual information at any time during a proceeding.

(ii) In the Secretary's written request to an interested party for a response to a questionnaire or for other factual information, the Secretary will specify the following: the time limit for the response; the information to be provided; the form and manner in which the interested party must submit the information; and that failure to submit requested information in the requested form and manner by the date specified may result in use of the facts available under section 776 of the Act and Sec. 351.308.

(iii) Interested parties will have at least 30 days from the date of receipt to respond to the full initial questionnaire. The time limit for response to individual sections of the questionnaire, if the Secretary requests a separate response to such sections, may be less than the 30 days allotted for response to the full questionnaire. The date of receipt will be seven days from the date on which the initial questionnaire was transmitted.

(iv) A notification by an interested party, under section 782(c)(1) of the Act, of difficulties in submitting information in response to a questionnaire issued by

the Secretary is to be submitted in writing within 14 days after the date of receipt of the initial questionnaire.

(v) A respondent interested party may request in writing that the Secretary conduct a questionnaire presentation. The Secretary may conduct a questionnaire presentation if the Secretary notifies the government of the affected country and that government does not object.

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19 C.F.R. § 351.303. Filing, format, translation, service, and certification of documents.

(g) *Certifications.* A person must file with each submission containing factual information the certification in paragraph (g)(1) of this section and, in addition, if the person has legal counsel or another representative, the certification in paragraph (g)(2) of this section:

(1) For the person's officially responsible for presentation of the factual information:

I, (name and title), currently employed by (person), certify that (1) I have read the attached submission, and (2) the information contained in this submission is, to the best of my knowledge, complete and accurate.

(2) For the person's legal counsel or other representative:

I, (name), of (law or other firm), counsel or representative to (person), certify that (1) I have read the attached submission, and (2) based on the information made available to me by (person), I have no reason to believe that this submission contains any material misrepresentation or omission of fact.

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19 C.F.R. § 351.309. Written argument.

(c) *Case brief.*

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(2) The case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results. As part of the case brief, parties are encouraged to provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited.

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19 C.F.R. § 351.310. Hearings.

(a) *Introduction.* This section sets forth the procedures for requesting a hearing, indicates that the Secretary may consolidate hearings, and explains when the Secretary may hold closed hearing sessions.

(b) *Pre-hearing conference.* The Secretary may conduct a telephone pre-hearing conference with representatives of interested parties to facilitate the conduct of the hearing.

(c) *Request for hearing.* Any interested party may request that the Secretary hold a public hearing on arguments to be raised in case or rebuttal briefs within 30 days after the date of publication of the preliminary determination or preliminary results of review, unless the Secretary alters this time limit, or in a proceeding where the Secretary will not issue a preliminary determination, not later than a date specified by the Secretary. To the extent practicable, a party requesting a hearing must identify arguments to be raised at the hearing. At the hearing, an interested party may make an affirmative presentation only on arguments included in that party's case brief and may make a rebuttal presentation only on arguments included in that party's rebuttal brief.

(d) *Hearings in general.*

(1) If an interested party submits a request under paragraph (c) of this sec-

tion, the Secretary will hold a public hearing on the date stated in the notice of the Secretary's preliminary determination or preliminary results of administrative review (or otherwise specified by the Secretary in an expedited antidumping review), unless the Secretary alters the date. Ordinarily, the hearing will be held two days after the scheduled date for submission of rebuttal briefs.

(2) The hearing is not subject to 5 U.S.C. Sec. Sec. 551-559, and Sec. 702 (Administrative Procedure Act). Witness testimony, if any, will not be under oath or subject to cross-examination by another interested party or witness. During the hearing, the chair may question any person or witness and may request persons to present additional written argument.

(e) *Consolidated hearings.* At the Secretary's discretion, the Secretary may consolidate hearings in two or more cases.

(f) *Closed hearing sessions.* An interested party may request a closed session of the hearing no later than the date the case briefs are due in order to address limited issues during the course of the hearing. The requesting party must identify the subjects to be discussed, specify the amount of time requested, and justify the need for a closed session with

respect to each subject. If the Secretary approves the request for a closed session, only authorized applicants and other persons authorized by the regulations may be present for the closed session (see Sec. 351.305).

(g) *Transcript of hearing.* The Secretary will place a verbatim transcript of the hearing in the public and official records of the proceeding and will announce at the hearing how interested parties may obtain copies of the transcript.

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No. 06-44

In the Supreme Court of the United States

TIMKEN U.S. CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly sustained the Department of Commerce's factual determination that petitioners failed to offer adequate documentary support for a change, after Commerce's initial record review was completed, in the level-of-trade classification for certain sales by petitioners, which Commerce uses to calculate the antidumping duty on petitioners' products.

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In the Supreme Court of the United States

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TIMKEN U.S. CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 434 F.3d 1345. The opinions of the Court of International Trade (Pet. App. 30a-50a, 53a-67a) are reported at 318 F. Supp. 2d 1271 and unreported, respectively.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2006. A petition for rehearing was denied on April 12, 2006 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on July 11, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Anti-Dumping Act, 1921, and the Tariff Act of 1930 have long provided for the imposition of anti-

dumping duties when "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. 1673.[1] If the sale of a product at less than its fair value causes or threatens injury to an industry in the United States, the statute provides for imposition of an antidumping duty "in an amount equal to the amount by which the normal value [*i.e.*, the price when sold 'for consumption in the exporting country'] exceeds the export price [*i.e.*, the price when sold 'to an unaffiliated purchaser in the United States']." 19 U.S.C. 1673, 1677a(a), 1677b(a)(1)(B)(i). The percentage by which the normal value exceeds the export price is the "dumping margin."

In assessing normal value, the Department of Commerce (Commerce) is directed by statute to base normal value upon home market sales at the same "level of trade" as the export price. 19 U.S.C. 1677b(a)(1)(B). The same "level of trade" means comparable marketing stages in the foreign market and in the United States market. See *NSK Ltd.* v. *United States*, 390 F.3d 1352, 1358 (Fed. Cir. 2004). If Commerce cannot find sales in the home market at the same level of trade as in the United States market, then it will compare sales in the United States and foreign markets at different levels of trade. *Ibid.* When comparing sales at different levels of trade, the statute permits Commerce to make a level-of-

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[1] This language was originally adopted in the Anti-Dumping Act, 1921, ch. 14, § 201, 42 Stat. 11, which, prior to 1979, was codified at 19 U.S.C. 160 *et. seq.* (1976). It was subsequently reenacted in 1979 as Title VII of the Tariff Act of 1930, ch. 497, 46 Stat. 590, as part of a more general revision of customs laws relating to the General Agreement on Tariffs and Trade. See Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 162 (19 U.S.C. 1673 *et seq.*).

trade adjustment based upon the price differences between the two levels of trade. 19 U.S.C. 1677b(a)(7)(A).

A level-of-trade adjustment may be made when sales "are made at different marketing stages." 19 C.F.R. 351.412(c)(2). Commerce's regulations provide that "[s]ubstantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing." *Ibid.* Although not always dispositive, the type of customer is an important indicator of differences in the level of trade. See *ibid.*; *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27,371 (1997). As with other adjustments, the burden of establishing that a particular adjustment is appropriate rests with the foreign respondent. Specifically, 19 C.F.R. 351.401(b)(1), states that "[t]he interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of [Commerce] the amount and nature of a particular adjustment."

2. After Commerce issues an antidumping duty order upon a product, annual reviews of that order are conducted upon request. See 19 U.S.C. 1675(a)(1); 19 C.F.R. 351.213(b). Reviews are to be conducted within 365 days, but may be extended to 545 days. See 19 U.S.C. 1675(a)(3)(A); 19 C.F.R. 351.213(h).

To conduct its reviews, Commerce issues questionnaires to the foreign respondents, seeking the information necessary to calculate the appropriate dumping margin. See 19 C.F.R. 351.221(b)(2); 19 C.F.R. 351.301(c)(2). Thus, it is particularly important for the questionnaire responses to be accurate and complete when they are submitted to Commerce. See *Nippon Steel Corp.* v. *United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003); *Olympic Adhesives, Inc.* v. *United States*,

899 F.2d 1565, 1571-1572 (Fed. Cir. 1990); *Rhone Poulenc, Inc.* v. *United States*, 899 F.2d 1185 (Fed. Cir. 1990).

When additional information is needed, or the foreign respondent's response is unclear, incomplete, or otherwise deficient, Commerce may issue supplemental questionnaires. See 19 U.S.C. 1677m(d). Pursuant to Section 1677m(i), information provided by a foreign respondent and relied upon by Commerce in its final decision must be verified by Commerce when, among other situations, Commerce is considering revocation of an antidumping order. See 19 C.F.R. 351.221(b)(3). Thus, when revocation is under consideration, Commerce conducts a verification following the submission of a company's questionnaire responses. See 19 C.F.R. 351.307.

Pursuant to Section 1677m(g), information submitted during the review is also subject to comment by other parties. To that end, when proprietary information is submitted, a public summary must be provided. 19 U.S.C. 1677f(a)(4). Moreover, before making its final decision, the statute requires Commerce to "cease collecting information" in order to provide the parties with a final opportunity to comment upon the information that has been gathered. 19 U.S.C. 1677m(g). Consistent with Section 1677m(g), Commerce has established a regulatory deadline for the submission of factual information. With certain exceptions not applicable here, all factual information is to be submitted 140 days after the publication of the notice of initiation, unless an extension is granted. 19 C.F.R. 351.301(b)(2).

Before issuing a final decision, Commerce issues a preliminary decision and affords the parties an opportunity to present written arguments, in the nature of a "case brief," concerning the preliminary decision. 19

C.F.R. 351.309. After considering the arguments and analyzing the data, Commerce issues its final decision.

The statute provides explicit authority for Commerce to correct its own ministerial errors in the final decision within a "reasonable time." 19 U.S.C. 1675(h). Although the statute does not specifically provide for the correction of respondent errors, in *Certain Fresh Cut Flowers from Colombia; Final Results of Antidumping Duty Administrative Reviews* (*Colombian Flowers*), 61 Fed. Reg. 42,834 (1996), Commerce articulated a six-part test for determining whether to allow correction of a party's errors. Commerce stated that it would

> accept corrections of clerical errors under the following conditions: (1) [t]he error in question must be demonstrated to be a clerical error, not a methodological error, an error in judgment, or a substantive error; (2) [Commerce] must be satisfied that the corrective documentation provided in support of the clerical error allegation is reliable; (3) the respondent must have availed itself of the earliest reasonable opportunity to correct the error; (4) the clerical error allegation, and any corrective documentation, must be submitted to [Commerce] no later than the due date for the respondent's administrative case brief; (5) the clerical error must not entail a substantial revision of the response; and (6) the respondent's corrective documentation must not contradict information previously determined to be accurate at verification.

Ibid.

3. In the tenth administrative review of the antidumping order regarding antifriction bearings from Germany, Commerce issued questionnaires to petition-

ers (among others) to determine whether any level-of-trade adjustment was necessary. Pet. App. 31a n.2. Specifically, Commerce instructed petitioners to report the channels of distribution for petitioners' home market sales, explaining that "the information [was] necessary to make appropriate comparisons of sales at the same level of trade or to adjust normal value, if appropriate, when sales are compared at different levels of trade." *Id.* at 33a-34a (brackets in original). In response, petitioners reported that they sold their products in the home market in five different channels: (1) sales from petitioners' factory to large original equipment manufacturers (OEMs); (2) sales from petitioners' factory to small OEMs; (3) sales from petitioners' factory to distributors; (4) resales by petitioners' affiliated marketing entity to OEMs; and (5) resales by petitioners' affiliated marketing entity to distributors. *Id.* at 2a-3a.

Commerce verified petitioners' categorization and found that petitioners had accurately reported the customer-category and channel of distribution fields in its sales databases. Pet. App. 3a. After reviewing petitioners' selling activities, the point at which those activities occurred, and the types of customers, Commerce determined that the second and third channels identified by petitioners were indistinguishable from one another in relevant respect, and that the fourth and fifth channels were also indistinguishable. *Id.* at 4a. Commerce therefore grouped petitioners' channels together as three, rather than five, levels of trade. *Ibid.* The first level of trade consisted of sales to large OEMs (which petitioners had classified as the first channel of distribution). The second reflected sales from petitioners' marketing entity (petitioners' fourth and fifth channels), while the third consisted of sales from petitioners' fac-

tory to small OEMs and distributors (petitioners' second and third channels). *Ibid.*; *id.* at 2a-3a. Those categories and their respective descriptions, provided by petitioners, allowed the parties and Commerce to determine how a particular sale should be classified. In other words, if a certain sale reflected all of the characteristics described in a particular level of trade category, that sale was properly categorized in that level.

On April 6, 2000, Commerce issued the preliminary results of its review, in which Commerce calculated a dumping margin for petitioners of 61.60%. Pet. App. 4a; *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Preliminary Results of Administrative Reviews, Partial Rescission of Administrative Reviews, and Notice of Intent to Revoke Orders in Part*, 65 Fed. Reg. 18,033 (2000). Petitioners submitted an administrative case brief, in which they maintained that they had "inadvertently and inaccurately" reported a number of sales in the first channel of distribution which should have been reported in the second or third channel. Pet. App. 4a-5a.

Petitioners claimed that three types of sales had been erroneously categorized: (1) replacement part sales; (2) sales to a division of a large OEM for use in manufacturing small electric tools; and (3) prototype sales. Pet. App. 5a. With respect to replacement parts, petitioners proffered invoices with handwritten notations indicating that those sales to large OEMs were intended for use as replacement parts. *Id.* at 20a-22a. As to the second group of sales, petitioners submitted invoices with a handwritten comment "product division electric tools." *Id.* at 23a. As to the third class, petition-

ers submitted invoices with a shipping address containing the word "Prototypen," two of which also contained the German word "Muster," indicating that they were for prototypes. *Id.* at 24a. Timken argued that each of the three disputed classes of sales should be recategorized under either channel 2 or 3. Petitioners argued that the small quantity of units involved in those sales demonstrated that the sales should not be classified under the first distribution channel, which, according to petitioners, normally included larger quantities of units. *Id.* at 25a.

Applying its six-part test under *Colombian Flowers*, Commerce concluded that petitioners' assertions of mistake did not qualify for correction. Commerce found that the errors were not "clerical," but rather "error[s] in judgment," that the new information conflicted with information already in the record, and that petitioners had not offered the new information at the earliest opportunity. Pet. App. 6a (quoting *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 65 Fed. Reg. 49,219 (2000)) (adopting Issues and Decision Memorandum from Richard W. Moreland, Deputy Assistant Secretary of Commerce, to Troy H. Cribb, Acting Assistant Secretary of Commerce regarding Case No. A-100-001 (Aug. 11, 2000), *available at* 2000 WL 3395001).

4. Petitioners contested Commerce's decision before the Court of International Trade. Although the court agreed that "the error at issue was not clerical," Pet. App. 43a, it nonetheless remanded the matter to Commerce on the ground that the *Colombian Flowers* test

should not be applied rigidly, and that petitioners' claims deserved more careful attention. *Id.* at 45a, 49a. In particular, the court directed Commerce to consider whether petitioners' "customers did not buy the units for use in producing large original equipment." *Id.* at 49a.

On remand, Commerce clarified that the word "large" modifies manufacturer, not the equipment produced by the manufacturer. See Pet. App. 3a n.1 (quoting No. 00-09-0454 (Dep't of Commerce June 7, 2004), slip op. 7). In compliance with the trial court's order, Commerce also specifically considered the documentation proffered by petitioners, but found that the documentation was not sufficient to show that the original classifications were in error. *Id.* at 7a.

On further review, the Court of International Trade sustained Commerce's remand determination. Pet. App. 53a-67a. The court held that Timken had not carried its burden of demonstrating that reclassification was warranted as to any of the three purportedly misclassified groups of sales. With respect to each group, the court accepted the validity of petitioners' evidence, but held that the evidence did not "describe the selling or marketing stages [as would be] required to reclassify those sales." *Id.* at 61a. See *id.* at 64a, 66a. In other words, petitioners did not show why, even accepting that the sales were for prototypes, or to a separate division, or for replacement parts, the sales satisfied the characteristics that defined a channel of distribution other than sales to large OEMs. See *id.* at 66a ("[Petitioners'] argument, which they have failed to make, must also include why the replacement sales are more appropriately classified in Channel 3 as opposed to Channel 1.").

5. The court of appeals affirmed. Pet. App. 1a-27a. The court first rejected Commerce's argument that the judgment should be affirmed on the alternative ground that the alleged errors were not clerical and thus could not be corrected under the *Colombian Flowers* test. The court held "that Commerce is free to correct any type of importer error—clerical, methodology, substantive, or one in judgment—in the context of making an antidumping duty determination, provided that the importer seeks correction before Commerce issues its final results and adequately proves the need for the requested corrections." *Id.* at 18a.

The court of appeals proceeded to uphold Commerce's determination on the merits. The court characterized the case as "basically involv[ing] a failure of proof; none of the new evidence that [petitioners] submitted adequately supports its position that it initially misclassified seventeen sales." Pet. App. 26a. As to the group of sales for replacement parts, the court of appeals found, as an initial matter, that handwritten notations on invoices (apparently added in connection with the request for reclassifications) suggesting that the sales were for replacement parts failed to demonstrate that the merchandise had, in fact, been used in that fashion. *Id.* at 20a-22a. Moreover, "[petitioners] did not offer a persuasive explanation of why, if the sale were really for spare parts, they should be categorized under channel 3 as opposed to channel 1," since petitioners had not mentioned replacement parts in their description of either channel of distribution, and the replacement sales were to large OEMs, which was how petitioners had chosen to define channel 1. *Id.* at 22a. Regarding sales for small electric tools, the court of appeals agreed with Commerce that the channels of distribution as originally

described by petitioners ("large" and "small" OEMs) depended on the size of the manufacturer, rather than the size of the goods produced, and thus that petitioners' evidence did not demonstrate that a reclassification was warranted. *Id.* at 23a. Similarly, the court noted that all of the "prototype" sales were to large OEMs and that there was no basis for reclassifying them from the large OEM channel of distribution to the channels for sales to small OEMs or distributors, especially since petitioners' questionnaire answers mentioned prototypes *only* in connection with the channel of distribution to large OEMs. *Id.* at 24a-25a. Finally, the court rejected petitioners' reliance on the small quantity of bearings involved in each disputed transaction, explaining that "[n]one of the channels of distribution, as defined by [petitioners], contain any numeric limitations," and that petitioners failed to substantiate their numerical claim with any evidence. *Id.* at 25a.

ARGUMENT

The court of appeals' fact-bound determination that petitioners did not adequately support their requests for reclassification of certain sales is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore not warranted.

1. Petitioners ask the Court to grant review to determine whether the "standard of proof" employed by Commerce is "at odds with Commerce's investigatory duties." Pet. 12. On petitioners' view of the case, that question is presented because "there can be no doubt that the Company met its burden of establishing a prima facie case in support of reclassification" based on documentary evidence, yet the court of appeals refused to

credit petitioners' evidence based solely on "conjecture" as to its credibility and other "speculative concerns." Pet. 18-19. Petitioners' understanding of the decision below is mistaken. The court of appeals held instead that, even accepting petitioners' evidence at face value, it did not show that Commerce's initial classifications were erroneous.

With respect to the "prototype" and small electrical tools sales, the court of appeals held that the evidence did not demonstrate that the sales (all of which had been classified in the first channel of distribution as sales to large OEMs) should have been classified under a different channel of distribution. Even if, as petitioners' evidence suggested, products sold to a division of a large OEM were intended for use in small tools, that fact would not support reclassification, the court reasoned, because, based on petitioners' "own descriptions of [their] channels of distribution," the relevant question was "the size of the producers," rather than the "size of the goods produced." Pet. App. 23a-24a.[2] Similarly, indications on certain invoices that the products may have been sold for use in prototypes did not warrant reclassification because petitioners' "own description of [their] channels of distribution" had mentioned prototype sales only "when discussing sales under channel 1,"

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[2] The court of appeals explained that petitioners had not been clear regarding their view as to whether "large" described the size of the producer or of the goods, Pet. App. 3a n.1, but inferred from petitioners' submissions in that court, the trial court, and before Commerce that petitioners were arguing that "large" modified the size of the goods, *ibid.* Petitioners now contend that the court of appeals misunderstood their argument, see Pet. 11, but offer no support for that assertion, and in any event that case-specific question would not warrant review.

"thereby suggesting that it consciously did not contemplate selling prototypes under channel 2 or 3." *Id.* at 24a-25a. In light of the fact that the prototype sales were to a large OEM, "the very customer defined for channel 1 sales," petitioners' evidence provided no basis for reclassifying them to channels 2 or 3. *Id.* at 25a.

Petitioners are correct that the court of appeals questioned the credibility of handwritten notations on invoices that were added in connection with petitioners' request for reclassification and offered in order to demonstrate that certain sales were intended solely for use as replacement parts. Pet. App. 20a-22a. The court was entirely correct in doing so. See *id.* at 8a (noting Commerce's view that petitioners "did not provide evidence showing the bearings were, in fact, used as replacement parts"). The court did not, however, rest its holding exclusively on questions regarding the strength of petitioners' evidence. Rather, the court held that, even assuming that the sales were for replacement parts, petitioners "did not offer a persuasive explanation of why * * * they should be categorized under channel 3 as opposed to channel 1." *Id.* at 22a. Petitioners' description of its channels of distribution "did not mention replacement part sales in either channel 1 or channel 3," and "the three customers who purchased the Replacement Part Sales were all 'large OEMs,'" the customer group described in channel 1. Thus, petitioners' evidence, even assuming it was valid, offers "no real basis for reclassifying the Replacement Part Sales." *Ibid.*

Contrary to petitioners' contentions (Pet. 18-19), therefore, this case is not about whether petitioners' "prima facie case" could be "overcome" by "speculative concerns" about its veracity. Rather, the question was whether petitioners' evidence compelled rejection of

Commerce's classification of the sales, which was amply supported by petitioners' original questionnaire responses as verified by Commerce. The court of appeals correctly held that Commerce's classifications were supported by substantial evidence and that "none of the new evidence that [petitioners] submitted adequately supports [their] position that [petitioners] initially misclassified seventeen sales." Pet. App. 26a.[3]

2. Relying on the general principle that "Commerce is required to determine a dumping margin that is as accurate as possible," Pet. 12, petitioners further contend that Commerce has the duty to "collect the information that is required for an accurate calculation," and that it "may not rely on the *absence* of information to support any decision, if such information could have been asked for, but was not," Pet. 13 (citing *Allegheny Ludlum Corp.* v. *United States*, 287 F.3d 1365, 1373 (Fed. Cir. 2002); *Creswell Trading Co.* v. *United States*, 15 F.3d 1054, 1061-1062 (Fed. Cir. 1994)). Petitioners thus attempt to shift to Commerce the blame for the absence of evidence to support petitioners' request for a reclassification. Petitioners' contention is mistaken, and there is no warrant for this Court's review on that issue.

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[3] Petitioners' reliance (Pet. 16) upon *Anderson* v. *Department of Transp.*, 827 F.2d 1564 (Fed. Cir. 1987), is misplaced. In *Anderson*, the Federal Aviation Administration relied on certain documentary evidence, the authenticity of which was disputed by the air controllers. The court of appeals held that the controllers' generalized allegations of tampering did not preclude the FAA from relying upon the documentary evidence. *Id.* at 1570. Here, in contrast, the court of appeals properly held that the disputed documentary evidence did not, on its own, compel rejection of agency findings that were supported by substantial evidence.

In antidumping cases, it is well settled that respondents bear the responsibility to build an adequate and accurate record. See *Fujitsu Gen. Ltd.* v. *United States*, 88 F.3d 1034 (Fed. Cir. 1996); *Olympic Adhesives, Inc.* v. *United States*, 899 F.2d 1565, 1571 (Fed. Cir. 1990); see also *Acciai Speciali Terni, S.P.A.* v. *United States*, 142 F. Supp. 2d 969, 982 (Ct. Int'l Trade 2001) ("It is the respondent's obligation to supply Commerce with accurate information. * * * Respondents 'must submit accurate data' and 'cannot expect Commerce, with its limited resources to serve as a surrogate to guarantee the correctness of submissions.'") (quoting *Yamaha Motor Co.* v. *United States*, 910 F. Supp. 679, 687 (Ct. Int'l Trade 1995)). Commerce depends upon respondents to submit accurate information that will enable Commerce to conduct its analysis and calculate the appropriate dumping margin. It is therefore incumbent upon respondents to provide accurate, complete responses.

Even assuming *arguendo* that, as petitioners maintain, Commerce instead has an affirmative responsibility to seek out the information it needs to assess correct antidumping duties, such a rule would not bear the weight petitioners place upon it. Here, Commerce did seek out from petitioners the information it needed to classify petitioners' sales, and Commerce verified that information. Only after Commerce had issued its preliminary findings did petitioners seek to challenge the accuracy of its own prior submissions in an effort to have some of those sales reclassified. In those circumstances, it is entirely appropriate to place on petitioners the burden of producing evidence that would demonstrate that the original classifications were inaccurate. Pet. App. 18a (Commerce may correct importer error at the preliminary results stage "provided that the importer seeks

correction before Commerce issues its final results and *adequately proves the need for the requested corrections*") (emphasis added); *id.* at 56a (petitioners "bear[] the burden of showing that the post-*Final Results* [*sic*] evidence changes the disputed channels of distribution * * * classifications").

Neither *Allegheny Ludlum* nor *Creswell Trading* is to the contrary. In *Allegheny Ludlum*, it was *Commerce*, rather than the private party, that attempted to change the preliminary results, and the Federal Circuit held that Commerce could not cite the absence of evidence that it had not sought as a basis for making that change. 287 F.3d at 1372-1373. Here, in contrast, it is petitioners who seek a change in the preliminary results, and until they have carried their burden of demonstrating that the original results are inaccurate Commerce has no further obligation to gather information. *Creswell Trading* is to similar effect. There, the Federal Circuit held that the importer had the burden of establishing that pig iron sales by the government of India were not on terms more favorable than those available on the commercial market and that the importer had "met this burden." 15 F.3d at 1061. Only then did the "burden of production shift[] back to Commerce to come forward with proof that this evidence was neither accurate nor sufficient" to establish the terms were not more favorable. *Ibid.* It was with respect to this latter burden that the court held that Commerce could not rely on mere assertions that the importer's methods of calculation were inaccurate. *Ibid.* In this case, petitioners never carried their burden of coming forward with evi-

dence to show that the original classifications were inaccurate, so the burden never shifted back to Commerce.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] In *Freeport Minerals Co.* v. *United States*, 776 F.2d 1029 (Fed. Cir. 1985), Commerce made a factual finding of no less-than-fair-value sales. The court of appeals held that Commerce's finding was not supported in light of the fact that the ITA had not conducted its review within the one-year period required by statute and had refused to request updated information from the importers despite the fact that an intervenor had provided evidence (the best available to it given its lack of access to the importers' records) that dumping continued. *Id.* at 1031, 1033; Pet. 14. Obviously, that has no relevance to this case, in which it was petitioners who initially provided the definitions of the channels of distribution and who had all the information about the sales that they claimed had been misclassified.